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A CONCISE TREATISE ON PRIVATE INTERNA-

THE LAWS

OF

PROBATE AND DIVORCE.

Ballantyne Press
BALLANTYNE, HANSON AND CO., EDINBURGH
CHANDOS STREET, LONDON

AN

EPITOME OF THE LAWS

OF

PROBATE AND DIVORCE.

BY

J. CARTER HARRISON,

SOLICITOR

(FIRST CLASS HONOURS, AND A LAW SOCIETY'S PRIZEMAN, TRINITY, 1880)
AND AUTHOR OF "AN EPITOME OF THE CRIMINAL LAW."

SECOND EDITION.

LONDON:
STEVENS AND HAYNES,
Law Publishers,
BELL YARD, TEMPLE BAR.
1883.

PREFACE TO SECOND EDITION.

SINCE the First Edition of this work went to the press several important alterations have been made in Statute Law as to Probate in common form, and important cases have been decided and Rules made bearing upon the Law of Divorce; these have been noted in the text, and the whole brought up to the present time.

The volume has been considerably enlarged, in the hope that in its present form it will be of more use to students.

J. CARTER HARRISON.

57, CHANCERY LANE, W.C.
June, 1883.

PREFACE TO FIRST EDITION.

In reading for the Final Examination for Solicitors, I, in common with many other students, found great difficulty in determining what authorities to read on the subjects of Probate and Divorce.

The ordinary text-books require more time and attention than a student of average ability can afford to give them, the Examination now covering so large an area and embracing so many subjects. I have therefore compiled the following pages, in the hope of being able to present to Students, in a readable form, a concise Epitome of Probate and Divorce Law, sufficient for the purposes of this Examination. I have given references throughout to cases and authorities, to enable the reader to acquire further information when desirable.

J. CARTER HARRISON.

November, 1880.

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THE LAW OF PROBATE.

THE LAW OF PROBATE.

Court of Probate, origin of.

PRIOR to the year 1857 all jurisdiction in cases of testacies and intestacies was vested in the Ecclesiastical Courts, and in the province of Canterbury such jurisdiction was exercised in the Prerogative Court of the Archbishop.

It is very difficult to define accurately at what precise period the clergy obtained their power over the estates of deceased persons; the following is an attempt to state, in a small compass, facts which may show, in a general way, how and when the Church obtained her undisputed authority.

"In Saxon times the law of intestacies was in the hands of secular judges, and the few traces of it that are left evince that the personal effects of an intestate, which remained after payment of his debts and other legal charges, were distributed among his wife and children, or other nearest of kin, by the order of his lord in the *soc* or manorial court" (*a*).

(*a*) Coote's Ecclesiastical Practice, p. 24.

But after the Norman Conquest the foreign ecclesiastics, who had swarmed into the country, encroached little by little on the prerogative of the lords of manors, and at last obtained full power over the estates of persons dying *intestate*, and in this struggle it seems they were greatly helped by the populace, owing perhaps in a great measure to the notorious contentions of Archbishop Becket with the Crown in the reign of Henry II., in which strife Becket always posed as the friend of the people and the champion of their rights.

By the statute 13th Edward 1, passed in the year 1285, it is enacted that "when after the death of any person *dying intestate* and bound unto some in debt, the goods come to the hands of the *ordinary* (*b*) to be disposed of, the ordinary shall from thenceforth be bound to answer for the debts so for as the goods suffice, in the same manner as executors would be obliged to answer in case he had made a will." From this it will appear that at that date the jurisdiction of the ordinary in cases of intestacy was well established; but at what precise period the Church acquired power to grant probate of wills it is impossible to say, it seems, however, to have been gradually usurped, as in the case of intestacies, in the first place by all the bishops, but afterwards such power was confined to the Archbishop of Canterbury, within his diocese. This was well settled by the year 1362 (*c*), for in that year the

(*b*) The bishop being the usual judge in such cases, was from this circumstance styled the ordinary by way of distinction from his extraordinary or peculiar jurisdiction.

(*c*) MS. reg. Islepe, folio 172.

Bishop of Lincoln having granted probate of the will of the Duke of Lancaster, the same was revoked, and fresh probate granted by the Archbishop; this jurisdiction was exercised by the Archbishop in the first instance in the Court of Arches (so called from the peculiar formation of the roof of Bow Church in which it was held); but in the year 1443 a new Court was founded called the Prerogative Court of Canterbury, and all powers formerly vested in the Arches Court were transferred thereto (*d*).

In the year 1857 an Act was passed (*e*) whereby, after reciting that it was expedient that all jurisdiction in relation to the grant and revocation of probates of wills and letters of administration in England should be exercised in the name of her Majesty by one Court, it was enacted that "the voluntary and contentious jurisdiction and authority of all ecclesiastical, royal peculiar, peculiar, manorial, and other Courts and persons in England then having jurisdiction or authority to grant or revoke probate of wills, or letters of administration, of the effects of deceased persons, shall in respect of such matters absolutely cease;" and further, that such voluntary and contentious jurisdiction, together with full authority to hear and determine all questions relating to matters and causes testamentary, shall belong to and be vested in her Majesty, and shall be exercised in the name of her Majesty in a Court to be called the Court of Probate (*f*). New Act.

(*d*) Coote's Ecclesiastical Practice, p. 81.
(*e*) 20 & 21 Vict. c. 77, Court of Probate Act, 1857.
(*f*) Ibid. ss. 3, 4.

To be a Court of Record.

"The Court of Probate shall be a Court of record, and such Court shall have the same powers, and its grants and orders shall have the same effect, throughout all England, and in relation to the personal estate in all parts of England, of deceased persons, as the Prerogative Court of the Archbishop of Canterbury, and its grants and orders respectively, now have in the province of Canterbury, or in the parts of such province within its jurisdiction, and in relation to those matters and causes testamentary, and those effects of deceased persons which are within the jurisdiction of the said Prerogative Court; and all duties which, by statute or otherwise, are imposed on or shall be performed by ordinaries generally, or on or by the said Prerogative Court in respect of probates, administrations, or matters or causes testamentary within their respective jurisdictions shall be performed by the Court of Probate: provided that no suits for legacies, or suits for the distribution of residues, shall be entertained by the Court, or by any Court or person whose jurisdiction as to matters and causes testamentary is hereby abolished" (*g*).

Suits for legacies or distribution not to be entertained.

Suits for legacies and distribution of residue which were formerly entertained by the Ecclesiastical Court, are therefore now left entirely to the Chancery, or in the same possible cases to the Queen's Bench Division of the High Court, and where the amount claimed does not exceed the sum of £500 then in the County Court (*h*).

(*g*) 20 & 21 Vict. c. 77, s. 23.
(*h*) 28 & 29 Vict. c. 99, s. 1.

By the 36 & 37 Vict. c. 66, the jurisdiction of the Court of Probate is transferred to the High Court of Justice, and all causes and matters then pending in the Court of Probate, and all causes and matters which would have been within the exclusive cognizance of the Court of Probate, are, with other business, assigned to the Probate, Divorce, and Admiralty Division (*i*). Now Probate, &c., Division.

The non-contentious practice of the Court is not altered by the above mentioned Act, and by the Judicature Act, 1875, it is expressly provided that the rules and orders of Court in force at the time of the commencement of that Act in the Court of Probate shall remain and be in force in the High Court of Justice, except so far as they are expressly annulled or varied by rules of Court made after the passing of that Act (*k*). Practice.

Voluntary, non-contentious, or common form business, for it is known by all three names, is defined as being "the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or letters of administration" (*l*). Common form business, what is.

There is established for each of the districts specified District registries.

(*i*) Sects. 16, 22, 34.

(*k*) In the goods of Tomlinson, 6 P.D. 209.

(*l*) Court of Probate Act, 1857, s. 2.

in Schedule A. to that Act and at the place therein mentioned, a public registry attached to and under the control of the Court of Probate, thereinafter referred to as the district registry, and to each district registry there is appointed one registrar with the requisite number of clerks and officers (*m*).

Probates and administrations by district registrars in common form.

The district registrars are empowered to grant probate of wills, or letters of administration in common form, upon application for that purpose being made to the district registry, if it shall appear by affidavit of the person or some of the persons applying for the same that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the district in which the application is made, such place of abode being stated in the affidavit, and such probate or letters of administration shall have effect over the personal estate of the deceased in all parts of England accordingly (*n*).

Such affidavit shall be conclusive for the purpose of authorizing the grant by the district registrar of probate or administration; and no such grant shall be liable to be recalled, revoked, or otherwise impeached, by reason that the testator or intestate had no fixed place of abode within the district at the time of his death; and every probate and administration granted by any such district registrar shall effectually discharge and protect all persons paying to or dealing with any executor or administrator thereunder (*o*).

(*m*) Court of Probate Act, 1857, s. 13. (*n*) Ibid. ss. 46, 47.
(*o*) Ibid. s. 48.

No grant to be made where there is contention.

The district registrar shall not grant probate or administration in any case in which there is contention as to the grant, until such contention is terminated or disposed of by decree or otherwise, or in which it otherwise appears to him that probate ought not to be granted in common form (*p*).

In case of doubt district registrar to take directions of judge.

If any question of difficulty should arise in the course of obtaining probate or administration in the *principal Registry*, the registrar may and generally does direct it to be brought before the Court on motion, and in every case in which it appears doubtful to a *district registrar* whether probate or letters of administration should or should not be granted, or where any question arises in relation to the grant, or application for the grant of any probate or administration, the district registrar shall transmit a statement of the matter in question to the registrars of the principal registry, who shall obtain the directions of the judge in relation thereto, and the judge may direct the district registrar to proceed in the matter of the application according to such instructions as to the judge may seem necessary; or may forbid any further proceeding by the district registrar in relation to the matter of such application, leaving the party applying for the grant in question, to make application to the Court of Probate through the principal registry, or if the case be within its jurisdiction to a County Court (*q*).

(*p*) Court of Probate Act, 1857, s. 50.

(*q*) Ibid. s. 53; and see Rules of March, 1863, Nos. 76. 77.

Caveats against the grant of probates or letters of administration may be lodged in a district registry, and immediately upon a caveat being so lodged, the district registrar shall send a copy thereof to the registrars to be entered among the caveats in the principal registry; and on the other hand, immediately upon a caveat being entered in the principal Registry, notice shall be given to the district registrar of the district, if any, in which it is alleged the deceased resided at the time of his decease, and to any other district registrar to whom it may be thought expedient to transmit the same. No caveat is to effect any grant made on the day on which the caveat is entered, or on which notice is received of a caveat having been entered in the principal registry. And further, caveats are to be warned from the principal registry only.

County Court jurisdiction.

Where it appears by affidavit to the satisfaction of a registrar of the *principal registry* that the testator or intestate had, at the time of his decease, his fixed place of abode within the jurisdiction of one of the district registries established by the Court of Probate Act, 1857, and that the personal estate of which the deceased died possessed, without deducting anything on account of debts, was under the value of £200, and that the deceased was not entitled beneficially to any real estate of the value of £300 or upwards, the judge of the County Court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode, shall have the *contentious* jurisdic-

tion and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto (*r*).

Upon the hearing of any such application, the Registrar of the County Court shall transmit to the District Registrar a certificate under the seal of the County Court of the decree made by the judge; and upon the application of the party in whose favour such decree has been made, a probate or administration in compliance with such decree shall be issued from such district registrar, or, as the case may require, the probate or letters of administration theretofore granted shall be recalled or varied by the district registrar according to the effect of such decree (*s*).

Registrar of County Court to transmit certificate of decree.

The judge of any County Court is to have the like power of enforcing judgments pronounced by him in disputes in matters testamentary as if the same had been an ordinary action in the County Court.

The affidavit as to the place of abode and state of the property of a testator or intestate which gives contentious jurisdiction to the judge of the County Court under the previous provisions, shall be conclusive for the purpose of authorizing the exercise of such jurisdiction, and the grant or revocation of probate or administration in compliance with the decree of such judge; and no such grant is

(*r*) Court of Probate Act, 1858, s. 10.
(*s*) 20 & 21 Vict. c. 77, s. 55.

liable to be recalled, revoked, or otherwise impeached, by reason that the testator or intestate had no such fixed place of abode within the jurisdiction of such judge, or by reason that the personal estate did in fact amount to or exceed the value of £200, or that the real estate of or to which the deceased was seised or entitled did in fact amount to or exceed £300, provided that where it shall be shown to such judge that the place of abode or state of the property of the testator or intestate has not been correctly stated in the affidavit, and if correctly stated would not have authorized him to exercise such contentious jurisdiction, he shall stay all further proceedings in his Court in the matter, leaving any party to apply to the Probate Division for such grant or revocation, and making such order as to costs as he may think fit. Any party dissatisfied with the determination of the judge of the County Court in point of law or upon the admission or rejection of evidence in any matter under the Act may appeal to the Probate Division and the decision of such Court shall be final (*t*).

Appeal.

"It would seem from Rule 19 of Ord. LVIII. Dec. 1876, and sect. 45 Judicature Act, 1873, that probate appeals from County Courts may be heard by other Divisional Courts as well as by the Probate Division" (*u*).

As to small estates.

The County Court has also a non-contentious jurisdiction in certain cases, thus where the whole estate and effects of an *intestate* shall not exceed in value £100 his

(*t*) 20 & 21 Vict. c. 77, ss. 56, 57, 58.

(*u*) Williams on Executors, 8th edition, 306.

widow or any one of his children, provided such widow or children respectively reside at a distance exceeding three miles from the Registry of the Court of Probate having jurisdiction in the matter, may apply to the registrar of the County Court within the district of which the intestate had his fixed place of abode at the time of his death, and the said registrar shall fill up the usual papers required by the Court to lead to a grant of letters of administration, and shall swear the applicant and attest the execution of the administration bond; and shall then transmit the said papers by post to the registrar of the Court of Probate having jurisdiction in the matter, who shall make out and seal the letters of administration and return them to the registrar of the County Court to be by him delivered to the applicant on payment of certain small fees.

The Registrar may require proof of identity; and where he has reason to believe that the real value of the estate is understated, he may refuse to proceed with the application until he is satisfied as to the actual value.

But none of these provisions are to affect duty on letters of administration (*x*).

And the above provisions are now extended to the estates of widows dying intestate possessed of property not exceeding in value £100, enabling any of her children to take out letters of administration in a similar manner (*y*).

(*x*) 36 & 37 Vict. c. 52, ss. 1, 2, 3, 6.
(*y*) 38 & 39 Vict. c. 27, s. 1.

It has been decided that where the deceased died possessed of real estate of the value of £300, although subject to mortgages which reduced the value to a sum below that amount, the County Court had no jurisdiction (*z*).

Will, what is.

A will may be defined as an instrument directing a certain disposition of property to take effect on the decease of the person executing the document. Every will is, until the same comes into effect by the death of the maker, of a revocable nature, consequently in questions as to whether a given document is a will or not, it becomes necessary to inquire whether the same could have been revoked in the lifetime of the maker; thus, where an agreement for a seven years' lease, duly executed and attested by two witnesses, contained a provision as to the application of the rent in the event of the lessor's death before the expiration of the lease, the lessee being beneficially interested in such application ; it was held that as no part of the agreement was revocable, and as it came into operation immediately upon its execution, it was not entitled to probate as a testamentary paper (*a*).

Must be revocable.

But on the other hand where a person executed as a will a paper writing which commenced, " I have given all I have to B," and contained provisions which were consistent with an intention that it should take effect after his death, it was held that the instrument was testamentary and entitled to probate (*b*).

(*z*) *Davies* v. *Brecknell*, 40 L. J. (P. & M.) 15 ; 23 L. T. 569.

(*a*) *Robinson, In Goods of*, L. R. 1 P. & M. 384.

(*b*) *Coles, In Goods of*, 41, L. J. P. 21, 25 L. T. 852.

The Court has no power to inquire into the validity of a will of the sovereign of the realm (*c*). Will of sovereign.

A will may be made contingent on the happening of a certain event. In one case where a mariner being about to sail from Liverpool to Wales made his will thus: "Should anything happen to me on my passage to Wales or during my stay there, I leave all my goods &c." it was held that the will was contingent on his dying during that voyage (*d*). Contingent.

But where a will commenced "On leaving this station for T. and M. in case of my death on the way, know all men this is a memorandum of my last will and testament," it was held that the will was not contingent upon the testator's death upon the voyage he was then about to undertake; Sir James Hannen saying that equivocal expressions ought not to be construed with too great nicety but that the general interpretation should be "knowing the uncertainty of human life and being about to enter on something particularly dangerous, I make this my will" (*e*).

A will may be made by two persons jointly to take effect on the death of the survivor; but upon the death of one it may be set aside by the survivor so far as it represents his will (*f*). Joint and mutual.

We now come to the consideration of the question who may make a will; and the general rule is that every person Who may make a will.

(*c*) *George III., In Goods of*, 8 Jur. (N.S.) 1134.
(*d*) *Roberts* v. *Roberts*, 5 L. T. (N.S.) 689.
(*e*) *Mayd, In Goods of*, 50 L. J. P. 7, 6 P. D. 30.
(*f*) *Raine, In Goods of*, 1 S. & T. 144.

of sound mind and understanding has a testamentary power, but this power must be exercised *animo testandi* and freely, not under threats or undue influence.

Infants.

Previously to the year 1838 an infant had power to bequeath personalty by will, when such infant, being a male, was of the age of fourteen years, or being a female was of the age of twelve years or upwards, but had no such power as to realty (*g*), but since the above-mentioned date no will made by an infant is valid (*h*).

Married women.

By the 34 & 35 Hen. 8, c. 5, s. 14, all wills or testaments made of any manors, lands, tenements, or other hereditaments by any woman covert shall not be taken to be good or effectual in the law.

And by the 8th section of Wills Act (1 Vict. c. 26) no will made by any married woman shall be valid, except such as might have been made by a married woman before the passing of that Act. But a married woman may make a will with the assent of her husband, but such assent is only a waiver of his rights as her administrator, and can only give validity to the will in the event of his being the survivor; and such assent is not sufficient if only general, it must be to the particular will and may be revoked by him at any time before probate (*i*).

Where property has been settled upon a married woman for her separate use, she takes it with all its privileges and

(*g*) 34 & 35 Hen. 8, c. 5, s. 14.

(*h*) 7 Will. 4 & 1 Vict. c. 26, s. 7. There is, however, one exception; see p. 43.

(*i*) *Willock* v. *Noble*, 7 H. L. 580.

incidents, one of which is a power of bequeathing, and as to this she may make a will as if *sole* (*k*).

A general devise in the will of a married woman, such will being executed since the Act, operates as the execution of a power of appointment vested in the testatrix (*l*).

The will of a married woman speaks from the date not from the death, therefore it must be republished on her becoming a widow to entitle it to a general probate (*m*).

But this must as to property coming within the provisions of the Married Women's Property Act, 1882 (45 and 46 Vict. c. 75) be received with caution, for by sect. 1 of that Act a married woman shall be capable of acquiring, holding, and *disposing by will* or otherwise of any real or personal property, in the same manner *as if she were a feme sole.*

Married woman as executrix.

And by sect. 18 of the last mentioned Act, a married woman who is executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person . . . . may sue or be sued, and may transfer or join in transferring property without her husband as if she were a *feme sole.*

Where a will of a married woman purports to be executed under a power the Probate Division will grant probate of it, leaving it to the competent Court of

(*k*) Williams on Executors, 8th Ed. 61.
(*l*) *Thomas* v. *Jones*, 8 Jur. (N.S.) 1224.
(*m*) *Wollaston, In Goods of*, 9 Jur. (N.S.) 727.

construction to decide whether it is a due execution of or operation under the power (*n*).

But in the case of a married woman executing a will under a power the appointment of executors is not sufficient to entitle the instrument to probate, if it disposes only of real estate (*o*).

A married woman who has obtained a protection order or a decree for judicial separation has the same power of disposing of her property as if she were a *feme sole*.

Lunatics. It is presumed that a will, rational on the face of it, and shewn to have been executed and attested in the prescribed manner, was executed by a person of competent understanding, but such presumption may be counterbalanced by evidence to the contrary, unless on the whole the evidence is sufficient to establish affirmatively that the testator was of sound mind when such will was executed (*p*).

Insanity. No general rule can be laid down as to what constitutes insanity, but the Court must be guided by the facts of each particular case, and then not merely to one particular act, but to all the intermediate stages of life (*q*).

A sound and disposing mind means a mind of natural capacity, not unduly impaired by old age or enfeebled by illness or tainted by morbid influence; if disease be once shewn to exist in the mind of a testator he has no disposing power; but where the testator has delusions on one

(*n*) Williams on Executors, 8th Ed. 56.
(*o*) *Tomlinson, In Goods of*, 6 P. D. 209; 50 L. J. P. 74.
(*p*) *Symes* v. *Green*, 5 Jur. (N.S.) 742.
(*q*) *Mudway* v. *Croft*, 2 No. of Cases, 442.

particular subject, apart from which he appears to be perfectly rational, manages his affairs with ordinary prudence, and exhibits considerable mental capacity, these delusions, if they can be shewn not to have affected the general faculties of his mind, and not to have affected any particular disposition of his property, will not deprive him of the right to make a will (*r*).

The treatment of an alleged lunatic by his friends and relations is not admissible evidence on the question of his sanity, and the Court must rely but little on the mere opinion of witnesses, but must look at the grounds on which those opinions were formed (*s*).

But the opinions of medical men are admissible in evidence not only when they rest upon the personal observations of the witness himself, but even when founded on the case as proved by other witnesses at the trial (*t*).

Lucid interval.

But in order to establish the validity of a will made during a lucid interval, it must be satisfactorily shewn that such lucid interval was a substantial not a temporary recovery; and in all cases, where the will of a testator afflicted with habitual insanity with intermissions is under consideration, the contents of the instrument itself afford valuable though not conclusive evidence of his state of mind (*u*).

Executor's costs.

Primâ facie an executor is justified in propounding his

(*r*) *Smee* v. *Smee and Corporation of Brighton*, 49 L. J. (P. D. & A.) 8.

(*s*) *Kindleside* v. *Harrison*, 2 Phill. 459.

(*t*) Taylor on Evidence, 6th Ed. 1229.

(*u*) *Nicholls* v. *Binns*, 1 S. & T. 239.

testator's will, and if the facts within his knowledge at the time he does so tend to shew eccentricity merely on the part of the testator, and he is totally ignorant at the time of the circumstances and conduct which afterwards induce a jury to find that the testator was insane at the date of the will, he will on the principle that the testator's conduct was the cause of litigation be entitled to receive his costs out of the estate, although the will be pronounced against (*x*).

Wife of felon.

It has been decided that the wife of a convicted felon was entitled to make a will as if she were a *feme sole*, but since the passing of 33 and 34 Vict., c. 23, this may be doubted (*y*).

Felon.

By this last mentioned Act, forfeiture for treason and felony is abolished, it would therefore seem to follow that traitors and felons are no longer incapacitated from making wills.

Outlaw.

But the Act does not affect the law of outlawry, it follows therefore that outlaws during their outlawry are incapable of making a will, their goods and chattels being forfeited during that time (*z*).

Alien.

By sect. 2 of the Naturalization Act, 1870 (33 Vict. c. 14), "real and personal property of every description may be taken, acquired, held and disposed of by the alien in the same manner in all respects as by a natural born subject."

(*x*) *Boughton* v. *Knight*, 3 L. R. P. 64; 42 L. J. P. 25.
(*y*) *Coward, In Goods of*, 13 L. T. (N.S.) 210.
(*z*) Williams on Executors, 8th Ed. 65.

A person born deaf and dumb, or who becomes so subsequently, may make a will, but it is essential that the instructions should be signified by such signs and motions that there can be no doubt as to his meaning (*a*). **Deaf and dumb.**

And where probate was sought of a will of a testator who was deaf, dumb, and illiterate, the Court required evidence on affidavit of the signs by which the testator had signified that he understood and approved of the provisions of the will before making the grant (*b*).

Probate is not to be allowed to issue of the will, or administration with the will annexed, of any blind or obviously illiterate or ignorant person until the registrars are satisfied that the will was read over to the testator before its execution, or that the testator had at such time knowledge of its contents (*c*). **Blind.**

Intoxication is temporary insanity; so long as it lasts the person under the influence of drink is under an incapacity to make any testamentary disposition, but this disability is removed on his again obtaining the possession of full sense (*d*). **Drunkenness.**

A will to be good must have been made by the testator voluntarily and of his own free will, and therefore where it can be shewn that actual force was used to compel the party to execute it, there can be no doubt that although all **Force.**

(*a*) *Owston, In Goods of*, 10 W. R. 410.
(*b*) *Geale, In Goods of*, 12 W. R. 1027.
(*c*) Rule 71, P. R. Non-C.
(*d*) *Wheeler and Another* v. *Alderson*, 3 Hag. Eccl. Rep. 602.

the formalities may have been complied with such a will cannot stand (*e*).

Fear. If a will be made under the influence of fear, it is void. But the fear must be such as might fairly be supposed to affect an ordinarily reasonable man, as "the fear of death," or of bodily hurt, or of imprisonment, or of loss of all or most part of one's goods, or the like whereof no certain rule can be delivered; but it is left to the discretion of the judge, who ought not only to consider the quality of the threatenings but also the persons as well threatening as threatened; in the person threatened the sex, age, courage, pusillanimity, or the like (*f*).

Fraud. Fraud in the eyes of the law is as detestable as open force, if therefore a will be obtained through fraud, it is no more binding than if executed under the influence of fear; but what amount of deceit will amount to fraud is left to the discretion of the judge.

If part of a will has been obtained by fraud, probate it should seem ought to be refused as to that part, and granted as to the rest (*g*).

Fraud must be pleaded specially, and cannot be raised under a plea of undue influence (*h*).

Undue influence. But although a will may not have been obtained by actual physical force, it may still be invalid if it can be shewn that undue influence was exercised to obtain its

(*e*) *Mountain* v. *Bennett*, 1 Cox, Ch. Ca. 355.
(*f*) Swinb. p. 7, s. 2, pl. 7. *Nelson* v. *Oldfield*, 2 Vern. 76.
(*g*) Williams on Executors, 8th Ed. 45.
(*h*) *White* v. *White*, 2 S. & T. 504; 31 L. J. P. & M. 215.

execution; but such influence cannot be presumed, it must be shewn that the circumstances under which the will was made are inconsistent with any hypothesis but that of undue influence, and such influence must have been exercised in relation to the will itself and not merely to other transactions (*i*).

What is.

The influence which is undue in the case of gifts *inter vivos* is different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos* it is considered by the Courts of Equity that the natural influence arising out of the relation of parent and child, husband and wife, doctor and patient, solicitor and client, confessor and penitent, or guardian and ward, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are therefore set aside, unless the party benefited can shew affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment. The law regarding wills is different. The natural influence which such relations as those in question involve may lawfully be exerted to obtain a will or a legacy, so long as the testator thoroughly understands what he is doing and is a free agent; and hence the rules adopted in Courts of Equity in relation to gifts *inter vivos* are not applicable to the making of wills (*k*).

(*i*) *Boyse* v. *Rossborough*, 6 H. L. Cas. 2; *Longford* (*Earl*) v. *Purdon*, 1 Ir. L. R. Ch. Div. 75, Prob.

(*k*) *Parfitt* v. *Lawless*, 2 L. R. P. 462; 27 L. T. J. 215.

To constitute undue influence the acts complained of must amount to coercion, no will can therefore be set aside on the ground of mere acts of kindness or attention.

Nature of Property devisable.

By sect. 3 of 1 Vict. c. 26, any person may dispose of, devise, or bequeath by his will, duly executed, all real estate and all personal estate which he may be entitled to at the time of his death, and which if not so disposed of would descend on his heir or his personal representatives according to the nature of the property, and this power extends to all real estate of the nature of customary freehold or tenant right, or copyhold, notwithstanding that the testator may not have been admitted thereto, or may not have surrendered the same to the use of his will; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whatsoever the nature of the property; and also to all contingent, executory, or other future interests in any real or personal estate.

Realty only.

The Court has no jurisdiction to grant probate of a will affecting realty only, unless there be an appointment of executors, for then they are usually entitled to probate, but not if the will be made under a power, for then the executors have their authority limited to such property as passes under the power, and can take nothing *jure representationis* (*l*).

(*l*) *O'Dwyer, In Goods of*, 5 Jur. (N.S.) 1366. And this applies to the will of a married woman also. *Tomlinson, In Goods of*, 6 P. D. 209.

But the bare nomination of an executor without giving any legacy or appointing anything to be done by him is sufficient to make it a will, and as a will it must be proved (*m*).

Heirlooms being in the nature of realty do not come within the jurisdiction of the Court; they are defined to be such goods and chattels as contrary to the nature of chattels shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor (*n*).

Realty and personalty.

Unless the same will which regulates the personalty also regulates the realty, the Court has no power to determine its validity as to the realty. So where a will was made by a domiciled Scotchman, affecting realty in England, and subsequently he executed two codicils not affecting such realty but affecting personalty jointly with the will, it was held that the Court had no jurisdiction to make a decree binding on the realty in England (*o*).

There are exceptions to the general rule, that probate or administration must be taken out to the personal estate of each deceased person before it can be dealt with, these are chiefly created by statute; thus the following property may be disposed of in the manner next mentioned without any grant being made.

Navy money,

On the death of any person being or having been an

(*m*) Williams on Executors, 8th Ed. 231. *Jordan, In Goods of*, 1 P. & D. 556.

(*n*) 3 Bl. Com. 427. Browne's Prob. 42.

(*o*) *Campbell* v. *Lucy*, 40 L. J. (P & M.) 22; 2 P. & D. 209.

&c., not exceeding £100.

officer, *seaman*, or *marine*, the amount (if any) to the credit of the deceased in the books of the Admiralty for arrears of pay, wages, prize money, or other allowances, may, if such amount do not exceed £100, be paid over to those legally entitled without any representation being taken out to the deceased (*p*).

The term *officer* means a commissioned, warrant, or subordinate officer or assistant engineer in her Majesty's naval or marine force. The term *seaman* or *marine* means a petty officer or seaman, non-commissioned officer of marines, or marine or other person (not being an officer as defined) employed on any of her Majesty's ships or in the naval reserve or naval coast volunteers (*q*).

Will of seaman, &c., in actual service.

In case of a will made since 1865 by any person in actual military service, or a mariner or seaman at sea, the Admiralty may pay or deliver any wages, prize money, bounty, &c., to any person claiming to be entitled thereto under such will, though not made with the requisite formalities, if the Admiralty are of opinion that in such particular case they may be dispensed with (*r*).

Officers' and soldiers' pay, &c., not exceeding £50.

The commissioners of the hospital at Chelsea with respect to pension and prize money, and the secretary at war with respect to pay, are empowered to pay over such pension, prize money, or pay to the next of kin or persons legally entitled as representatives of any deceased

(*p*) 28 & 29 Vict. c. 111, ss. 3, 8.
(*q*) Ibid. s. 2.
(*r*) 28 & 29 Vict. c. 72, s. 7 (Navy and Marines Wills Act, 1865).

officer, non-commissioned officer, soldier, or pensioner, if the amount of the same do not exceed £50, without the necessity of taking out probate or letters of administration (*s*).

Money and effects of merchant seamen under £50.

If the money and effects of any deceased seaman, paid, delivered, or remitted to the Board of Trade, including money received for any effects which have been sold, do not exceed £50, the Board of Trade may pay over the same to any person or persons who would have been entitled to take out probate or letters of administration (*t*).

Savings banks for seamen, deposits in.

All sums of money due from the Board of Trade to the estate of any deceased person entitled to any deposit in any savings bank for seamen established under the Act cited below shall be paid and applied by such Board to the same persons to whom and in the same manner and subject to the same conditions on which money and effects of a deceased seaman are payable and applicable under the Merchant Shipping Act, 1854 (*u*).

Deposits in savings banks not exceeding £50.

In case of any person dying leaving in a savings bank deposits not exceeding £50, exclusive of interest, and probate or letters of administration are not taken out within two months of the death, the trustees and managers of the bank may pay the same to the persons appearing to them to be entitled according to the Statute

(*s*) 11 Geo. 4 & 1 Will. 4, c. 41, s. 5.

(*t*) 17 & 18 Vict. c. 104, s. 199 (Merchant Shipping Act, 1854).

(*u*) 19 & 20 Vict. c. 41, s. 5, being an Act to establish savings banks for seamen.

of Distributions, or according to the rules of such savings bank (*x*).

These conditions also apply to a deposit in a post-office savings bank (*y*).

Deposits in building societies not exceeding £50.

If any member of or depositor in a society under the Building Societies Act, 1874, having in the funds of such society a sum of money not exceeding £50, shall die intestate, the directors may pay the same over to the person or persons who may appear to them to be entitled under the Statute of Distributions, without taking out letters of administration (*z*).

Shares in industrial society not exceeding £50.

A member of an industrial or provident society, not being under the age of sixteen years, may by writing under his hand nominate some person to whom his shares in the society shall be transferred at his death, provided that the amount credited to him in the books of the society does not exceed £50; and on receiving satisfactory proof of the death of a nominator the committee of the society shall transfer the shares or pay the full value thereof to the person entitled under the nomination.

Further, if any member of a society entitled to an interest therein not exceeding £50 die intestate, and without having made any nomination under the Act which remains unrevoked at his death, such interest shall be transferable or payable without letters of administra-

(*x*) 26 & 27 Vict. c. 87, s. 43.
(*y*) 24 Vict. c. 14, s. 14.
(*z*) 37 & 38 Vict. c. 42, s. 29.

tion to or among the persons who appear to the majority of the committee to be entitled thereto (*a*).

The provisions of the above-mentioned Acts, as to the formalities to be observed, and proof of relationship to be shewn before payment to the relatives will be permitted, are too lengthy to be inserted in a work like the present. The reader requiring further information on these or other points is therefore referred to the Acts themselves.

Where the Property is situate.

No personal property in England.

The Court has no power to grant administration of the goods of a deceased person who leaves no property in this country, nor has the Court jurisdiction to grant probate (*b*) of a will disposing only of property in a foreign country (*c*).

Locality or property.

Judgment debts are assets for the purpose of jurisdiction where the judgment is recorded, leases where the land lies, specialty debts where the instrument happens to be, and simple contract debts where the *debtor* resides at the time of the testator's death; and as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments are assets where the debtor lived and not where the instrument was found (*d*).

(*a*) 39 & 40 Vict. c. 45, s. 11, sub.-ss. 5 and 6.
(*b*) *Fittock, In Goods of*, 9 Jur. (N.S.) 311.
(*c*) *Coode, In Goods of*, 16 L. T. (N.S.) 746.
(*d*) *Att.-Gen.* v. *Bouwens*, 1 Horn. & Hurlst. 319.

Domiciled in England.

But it is otherwise if the deceased had been domiciled in England, for as personal property wherever situate follows the person, the Court will grant probate though it purports to deal only with property out of its jurisdiction (*e*).

The rule is that the distribution of personal assets of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of the birth or the death (*f*).

Bonds of foreign country.

And probate duty is payable in respect of foreign bonds of which a testator dying in this country was holder at his death, and which have come into the hands of his executors in this country, such bonds being marketable securities within this kingdom, saleable and transferable by delivery only, and no further act outside this country being necessary to render the transfer valid (*g*).

Where the Deceased died.

The administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death.

"The Court of the domicil is the *forum concursûs* to which the legatees under a will or the parties entitled to the distribution of the estate of an intestate are

(*e*) *Winter, In Goods of*, 30 L. J. (P. & M.) 56.
(*f*) Williams on Executors, 8th Ed. 1521.
(*g*) *Att.-Gen.* v. *Bouwens*, 4 M. & W. 191.

required to resort:" but when the personal property is situate in this country, it must be administered by the Courts in this country, though in the performance of that duty they will be guided by the law of the domicil (*h*).

Thus where an executor is appointed by a foreign will, the nature and extent of the office are regulated by the law of the testator's domicil, if by the law of the domicil the executorship be only for a limited time, the Court here cannot after the expiration of that time grant probate (*i*).

It is a general rule that when a person dies domiciled in a foreign country and the Court of that country invests anybody, no matter whom, with the right to administer the estate, the Court ought to follow the grant, simply because it is the grant of a foreign Court, without investigating the grounds on which it was made and without reference to the principles on which grants are made in this country (*k*).

Where the Will was made.

Will valid by law of foreign land.

In order to obtain probate in this country of a foreign will proved abroad it must be shewn that the foreign Court has adopted it as a valid testament, or where there has been no dispute, that it is valid according to the law of the foreign country, and that the testator was domiciled in the foreign country (*l*).

(*h*) *Enohin* v. *Wylie*, 10 W. R. 467.
(*i*) *Laneuville* v. *Anderson*, 2 S. & T. 24.
(*k*) *Smith, In Goods of*, 16 W. R. 1130, per Lord Penzance.
(*l*) *De Vigny* (*Countess*), *In Goods of*, 13 W. R. 616, 640.

And probate in this country will not be granted *in the first instance* of the will of a foreigner executed abroad according to the formalities required by *English* law; but it must be first proved in his own country, for although the Naturalization Act, 1870, gives an alien power to dispose of property by will it does not give him power to make such will in a form contrary to the law of his own land (*m*).

Of British subjects.

The question of validity of the will of a *British subject* is much simplified by the 24 & 25 Vict. c. 114, known as Lord Kingsdown's Act, which enacts that every will or other testamentary instrument made *out* of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, *or* by the law of the place where such person was domiciled when the same was made, *or* by the laws then in force in that part of her Majesty's dominions where he had his domicil of origin (*n*).

Further, all wills made *within* the United Kingdom are admitted to probate in England and Ireland, and to confirmation in Scotland, if made according to the laws

(*m*) *Baroness von Buseck, In Goods of*, 6 P. D. 211.
(*n*) Sect 1.

of the place where they were executed, whatever may be the domicile of the testator at the time of his death; thus, a will made in Scotland according to Scotch law, or in Ireland according to Irish law, may be proved in England without being first proved in either of the other countries although the testator died domiciled in any part of the will (*o*).

Probate was granted under this section in a case where a naturalized British subject, whilst domiciled in England, made a will in the form required by the English law, and at the time of his death was domiciled in Italy (*p*).

This Act only applies to wills and other testamentary instruments made by persons dying after the 6th August, 1861 (*q*).

Formerly when a person died domiciled in England, Scotland, or Ireland, and possessed of property in both or either of the two countries in which he was not domiciled, great difficulty arose in dealing with his estate, but this has been to a great extent removed by the provisions of the following Acts of Parliament.

Scotch confirmations to have effect of English probate.

It is enacted by the 21 & 22 Vict. c. 56, s. 12, that when any confirmation of the executor of a person who shall be found to have died domiciled in Scotland, which includes, besides the personal estate in Scotland, personal estate in England, shall be produced in the Principal Court of Probate in England . . . . such confirmation

(*o*) Sect. 2.
(*p*) *Galley, In Goods of*, 1 P. D. 438.
(*q*) Ibid. s. 5.

shall be sealed with the seal of the Court, and shall then have the like effect and force in England as if a probate or letters of administration had been granted by the said Court of Probate.

By sect. 15 it is also provided that any such confirmation being produced to the Court of Probate in Dublin, and being sealed with the seal of the Court, shall have the like force and effect in Ireland as if a probate or letters of administration had been granted by the Court of Probate in Dublin.

Applications to affix the seal of the Court to Scotch or Irish grants must be made to the principal not a district registry (*r*).

English probate to have effect of Scotch confirmation.

And by sect. 14 of the same Act when any probate or letters of administration granted by the Court of Probate in England to the executor or administrator of any person who died domiciled in England or by the Court of Probate in Ireland to the executor or administrator of any person who died domiciled in Ireland shall be produced to the Commissary Court at Edinburgh, such probate or letters of administration shall have the same effect in Scotland as if a confirmation had been granted by the said Court.

Notation of domicile.

Whenever a grant is made by the English Court under the above Act for the whole personal estate and effects of a deceased within the United Kingdom, it must appear by the affidavit for the Inland Revenue that the testator or intestate died domiciled in England, and that he was

(*r*) Rule 87, D. R.

possessed of personal estate in Scotland, and the value thereof must be stated in such affidavit. Upon all such grants a note or memorandum must also be written and signed by one of the registrars to the effect that the deceased died domiciled in England (*s*).

This is known as notation of the domicile of the deceased.

English grants to have effect in Ireland.

There is no necessity for notation of domicile when the deceased died possessed of property in England and Ireland only, for it is provided by the 20 & 21 Vict. c. 79, that when any probate or letters of administration granted by the Court of Probate in England shall be produced to the registrars of the Court of Probate in Irelan , such probate or letters of administration shall be sealed by the Court in Ireland, and shall then have the same operation as if originally granted by that Court (*t*).

And by the same Act provision is made for giving Irish grants the same effect in England as if originally granted by the Court in England on being sealed with the seal of that Court (*u*).

Execution of a Will.

Wills before 1883.

Before the passing of the Wills Act a will of personalty need not have been in writing; the 5th sect. of the Statute of Frauds which required writing and attestation

(*s*) Rule 74.
(*t*) Sect. 94.
(*u*) Ibid. s. 94.

to a will to give it validity, only applied to realty, therefore a mere nuncupative will was sufficient to pass personalty, subject, however, to certain restrictions, which were so exacting, and were construed so strictly, that, as a matter of fact, wills were always reduced into writing, but such wills need not have been signed or attested if they could be otherwise proved; it is not proposed to inquire into the formalities necessary to give validity to a will before 1838, as they are of comparatively little importance at the present time; only the requisites now essential will therefore be mentioned (*x*).

Wills since 1838.

By the 9th sect. of the Wills Act (1 Vict. c. 26) it is enacted that no will shall be valid unless it shall be in writing and executed in manner thereinafter mentioned (that is to say), "it shall be signed at the *foot or end* thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made *or* acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

By sect. 10: "No appointment made by will, in exercise of any power, shall be valid unless the same be executed in manner hereinbefore required; (*i.e.*, by sect. 9). And every will executed in manner hereinbefore required shall so far as respects the execution and attestation

(*x*) For an account of the formalities formerly required, see Williams on Exors., 8th Ed., vol. i., or Browne on Probate, p. 59.

thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required; thus a will made in exercise of such power should be executed with some additional or other form of execution or solemnity."

Amending Act.

There being much litigation on the point as to when a will was signed "at the foot or end thereof," it became necessary to pass an amending Act, accordingly it is now provided (*y*) that every will as to the signature of the testator shall be deemed to be valid if the signature shall be so placed at or after, or following or under, or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, ... or that a blank space shall intervene between the concluding word of the will and the signature, ... or that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation or shall follow or be after or under or beside the names, or one of the names of the subscribing witnesses, or that the signatures shall be on a page . . . . of the will whereon no clause of the will shall be written; but no signature shall be operative to give effect to any disposition or insertion after the signature shall be made.

(*y*) 15 Vict. c. 24, s. 1.

In considering the question of whether the signature of the testator is in a proper position within the meaning of the 1 Vict. c. 26 and the 15 Vict. c. 24, the Court must in every case be satisfied by evidence or by reasonable inferences: (1) That the testator duly wrote his name either with his own hand or vicariously as permitted by the Act. (2) That his name was on the will before the attesting witnesses wrote theirs (*z*).

Signature by mark.

A will is sufficiently signed by the testator putting his mark thereto, instead of writing his name, although he can write well (*a*).

By some other person.

When the testator is too ill to write his own name, it may be done by a third party in his presence and that of the attesting witnesses, but such signature must be accompanied by some words or act on the part of the testator to shew that it was done at his request (*b*).

Signature, position of.

Where a testator's signature was written partly across the last line but one of the will, and entirely above the last line with the exception of one letter which touched the last line, it was held that the will was duly signed at the foot or end thereof (*c*). Again, where a will ended in the middle of the third page of a sheet of foolscap paper, a blank being left on that page, and the signatures and attestation clause being written on the top of the fourth page, it was held to be well executed (*d*).

(*z*) Browne on Prob. p. 68.
(*a*) *Taylor* or *Baker* v. *Denning*, 2 Jur. 775.
(*b*) *Marshall, In Goods of*, 13 L. T. (N.S.) 643.
(*c*) *Woodley, In Goods of*, 33 L. J. (P. & M.) 154.
(*d*) *Hunt* v. *Hunt*, 14 L. T. (N.S.) 859.

Where the testimonium clause of a will was as follows: "In witness whereof I, Martin Hall Mann, have hereunto set my hand," which was in the handwriting of the testator but the will was not otherwise signed, it was held that the will was duly executed, the signature being placed "among the words of the testimonium clause" (*e*).

And where there being no room for a signature at the foot of a will, the testator signed by writing his name transversely along the left hand margin near the top, and running downwards to the commencement of the second line of the will, and the attesting witnesses signed above the will and opposite to a portion of the testator's signature, it was held to be well executed (*f*). And where the deceased with his own hand wrote out a will, and also the attestation "signed, published, and declared by the said A. B. (the testator) as and for his last will, &c., and at the time of execution declared the paper to be his will, in the presence of two witnesses, and they witnessed it, but he did not sign such will further than by the signature in the attestation clause; this was held to be a valid execution (*g*).

Parol evidence of contents.

Oral and written declarations of a testator, whether made before or after the date of execution of a will, are admissable in evidence for the purpose of showing what were the constituent parts of it at the time of execution (*h*).

(*e*) *Mann, In Goods of*, 28 L. J. (P. & M.) 19.
(*f*) *Collins, In Goods of*, 3 L. R. Ir. 241.
(*g*) *Pearn, In Goods of*, L. R. 1 P. & M. 143.
(*h*) *Gould* v. *Lakes*, 6 P. D. 1, 43 L. T. 382.

Attestation.

It is not necessary that the two attesting witnesses should *write* their names; they may instead make their marks on the will to represent signatures, but in all such cases the Court must be satisfied that such mark was intended as an *act of attestation*, and the Court will, in the absence of contrary evidence, presume that the instrument was duly executed, even where the attesting witnesses were both dead and no evidence other than the marks can be given of the mode of execution (*i*).

But where a will was written twice on different sheets of paper, and by mistake the testator signed one and the attesting witnesses the other, it was held not duly attested (*k*).

Gift to attesting witness.

By the 15th sect. of 1 Vict. c. 26, if any person to whom or to whose husband or wife a gift is made shall attest the will by which such gift is made, the same (*i.e.*, the gift) is void; but this does not apply to the marriage *after* attestation of the devisee to the attesting witness (*l*).

"In the presence of."

Deceased in the presence of A. and B. wrote something, but what they did not know, to the foot of a paper, then covering up all writing on the paper, she requested them to sign their names, which they did, but she did not explain to them the nature of the writing, nor did they see her signature, it was held, that as the Court was satisfied, from the circumstances of the case, that the

(*i*) *Clarke* v. *Clarke*, 5 L. R. Ir. 47 C. A.
(*k*) *Hatton, In Goods of*, 6 P. D. 204.
(*l*) *Thorpe* v. *Bestwick*, 6 Q. B. D. 311, 44 L. T. 180.

testatrix wrote her signature in the presence of the witnesses, though they might not know it, the execution was valid (*m*).

But where the testator, though corporally present, is in a state of insensibility, the will is not duly executed (*n*).

Nor is the will duly executed if it be signed by the testator in the presence of the witnesses, but they do not in his presence but in an adjoining room (*o*).

Acknowledgment of signature by testator.

The will need not be actually signed by the testator in the presence of the witnesses, it may be acknowledged by him as his act (1 Vic. c. 26, s. 9); thus A. requested B. to prepare a will for him, by which B. was appointed sole executor, and when prepared it was signed by A. B. then sent for C. and D., and in A.'s hearing requested them to attest the signature, which they did, and A. thanked them; this was held a good acknowledgment (*p*).

But to constitute a sufficient acknowledgment, the witnesses must see, or have the opportunity of seeing, the testator's signature (*q*).

Insufficient attestation clause.

If there be no attestation clause to a will or codicil, or if such clause be insufficient, an affidavit by one at least of the attesting witnesses must be furnished to the registrars proving that the provisions as to signature

(*m*) *Smith* v. *Smith*, L. R. 1 P. & M. 143.
(*n*) *Right and Carter* v. *Price*, 1 Dougl. 241.
(*o*) *Jenner* v. *Ffinch*, 5 P. D. 106, 42 L. T. 327.
(*p*) *Bishop, In Goods of*, 30 W. R. 567.
(*q*) *Gunstan, In Goods of*, 7 P. D. 102.

before mentioned have been complied with; and in case such provisions have not been complied with, the registrars must refuse probate; and if both the subscribing witnesses are dead, or if no affidavit can be obtained from either of them, the will may be proved by other persons present at the time of signing, but if no such proof can be obtained, evidence on affidavit must be given of that fact, and of the handwriting of the deceased, and the subscribing witnesses, and of other circumstances which may raise a presumption in favour of due execution (*r*). The Court will not dispense with the affidavit as to due execution, when the attestation is insufficient (*s*).

But if both the attesting witnesses be dead, or if from any other cause their evidence cannot be obtained, the Court on evidence of that fact will dispense with the proof of execution (*t*).

Exceptions.

Exceptions.

It is, however, provided by the 1 Vict. c. 26 (*u*) that any *soldier being in actual military service,* or any *mariner or seaman being at sea,* may dispose of his personal estate, as he might have done before the date of that Act (*ante,* p. 37).

Actual military service.

As to the words "actual military service," they only apply to persons on an expedition, and therefore the

(*r*) Rules 4–7.
(*s*) *Latham, In Goods of,* 10 Jur. (N.S.) 620.
(*t*) *Burgoyne* v. *Showler and Robertson,* 5.
(*u*) 1 Vict. c. 26, s. 11.

nuncupative will of a soldier, quartered in New Brunswick, was not admitted to probate (*x*).

Mariner or seaman at sea.

The words "mariner or seaman at sea" include all members of these professions from the highest to the lowest; thus where a surgeon in the navy was invalided when on foreign service, afterwards on his homeward journey in a passenger ship he wrote a letter, signed but not witnessed, directing a certain disposition of his property, and died before reaching England, it was held that the letter was entitled to probate as made by a "mariner or seaman at sea" (*y*).

Minor, a seaman.

And it has been held that a *minor*, who is a seaman at sea, comes within the exception contained in the above statute, and therefore may make a will (*z*).

Navy and Marines Wills Act, 1869.

By the 28 and 29 Vict. c. 72 (The Navy and Marines Wills Act, 1869), the will of a person serving as a seaman or marine shall not be valid to pass any wages, prize money, grant, or other money payable by the Admiralty unless executed with the formalities required by the English law; and when made on board one of her Majesty's ships one of the two requisite attesting witnesses shall be a commissioned officer, chaplain, or warrant or subordinate officer; but the Admiralty has power to pay over or deliver the effects of the deceased to any persons claiming to be entitled thereto under such will, though not made in conformity with the provisions of that Act,

(*x*) *White* v. *Ripton*, 3 Curt. 818.
(*y*) *Saunders, In Goods of*, 11 Jur. (N.S.) 1027, L. R. 1 P & D. 16.
(*z*) *McMurdo, In Goods of*, 16 W. R. 283, L. R. 1 P. & D. 540.

if in their opinion it is advisable so to do; the term "seaman" or "marine" as used by the Act means a petty officer, or seaman, or non-commissioned officer of marines.

Revocation.

Revocation.

No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent unless such alteration shall be executed, in like manner as is required for the execution of a will; but the will with such alteration as part thereof shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of some memorandum referring to such alteration, and written at the end or some part of the will (*a*).

By marriage.

Every will made by a man or woman is revoked by his or her marriage (except a will made in exercise of a power of appointment), when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, executor, or administrator, or the person entitled as the next of kin under the Statute of Distributions (*b*).

Thus by a deed of settlement executed between a wife and her intended husband, property was conveyed to

(*a*) 1 Vict. c. 26, s. 21, and see *Blewitt, In Goods of*, p. 51.
(*b*) Ibid. s. 18.

trustees to pay the income to the wife herself during her life, and if she predeceased her husband, then to him for life, if she should so appoint by will, but not otherwise, and if she did not so appoint, then it was to go to the issue of the marriage. The same day she made a will exercising her power of appointment in favour of her intended husband; this will was held to be an exception within the foregoing paragraph, and was therefore not revoked by the subsequent marriage (*c*).

Intention.

Where the testator having executed a will subsequently married, and afterwards made a codicil by which he made a provision for his wife, and in all other respects revived, ratified, and confirmed his will; on his death the codicil could not be found; but it was proved that he had expressed an intention of adhering to his will, up to the time of his death; it was held that the destruction of the codicil could not have been intended as a revocation of the will, and therefore probate was granted of the will and the codicil as contained in a draft (*d*).

But where a will was found after the death of the testatrix with the signature and attestation clause cut off and folded inside the will, there being no other evidence of intention, it was held that there was sufficient evidence of an *animus revocandi* (*e*).

On the other hand, where a testator, suffering under an

(*c*) *Worthington, In Goods of*, 25 L. T. 853.
(*d*) *James* v. *Shrimpton*, L. R. 1 P. D. 431.
(*e*) *Magnesi or Magnes* v. *Hazleton*, 44 L. T. 586.

attack of delirium tremens, tore his will in pieces, and on his recovery expressed his regret, saying he must make a fresh will, which, however, he did not do, it was held that the will was not revoked (*f*).

By another will, &c., or by destruction.

No will, or codicil, or any part thereof, can be revoked otherwise than as aforesaid, or by another will or codicil, or by some writing declaring an intention to revoke the same, and executed as a will, or by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of destroying the same (*g*).

Where a testator drew his pen through various lines of his will, and wrote on the back, "This is revoked," and threw it among some waste papers in his room, and it was found at his death uninjured, it was held that the will was not revoked, the words of the principal Act, "or otherwise destroying," not having been complied with (*h*).

Again, where a person executed a will and codicil, and in the latter referred in several paragraphs to the dispositions contained in the will, and more particularly bequeathed a legacy to be held upon the conditions of the will, afterwards the testatrix destroyed the will by burning, but preserved the codicil, it was held that the codicil was not revoked by any of the methods required and must be admitted to probate (*i*).

(*f*) *Brunt* v. *Brunt*, 3 L. R. P. 37.
(*g*) 1 Vict. c. 26, s. 20.
(*h*) *Cheese* v. *Lovejoy*, L. R. 2 P. D. 111.
(*i*) *Turner, In Goods of*, 2 L. R. P. 403, 27 L. T. 322.

Dependent relative revocation.

The act of mutilation or destruction is equivocal; when intentional it is sometimes accompanied by the intention not only of destroying and annulling the mutilated document, but also of setting up some other will in its place; when therefore it can be inferred that the testator at the time of destroying one will intended to execute another in its place, but by mistake or for some other reason such second will was not duly signed, the doctrine of what is called dependent relative revocation arises, and the revocation of the former will is not valid unless the second will be executed in his stead (*k*).

And to establish such a case of dependent relative revocation, it must be shewn by the evidence of disinterested witnesses that the destruction was referable *wholly and solely* to an intention to set up some other testamentary paper (*l*).

Inconsistent dispositions.

And a will may be revoked by a subsequent will containing inconsistent dispositions of the property; but this only applies when the dispositions are so inconsistent that the papers cannot stand together (*m*).

Probate.

There are two ways of granting probate, either in solemn form or in common form. Probate in common form is much the more usual, and is simply the mode of obtaining

(*k*) Browne's Principles and Practice of the Court of Probate, p. 97.

(*l*) *Eckersley* v. *Scott*, 5 Jur. (N.S) 298.

(*m*) *O'Leary* v. *Douglass*, 1 Ir. L. R. Ch. Div. 45, Prob.

probate without suit, in ordinary cases when the right thereto is not disputed (*ante*, p. 7); probate in solemn form, however, is obtained by a decree of the Court, after an examination of witnesses, or such other evidence as the case may require, and citations must have been served on the heir-at-law, widow, next-of-kin, and all other persons claiming any interest in the property, and the decree so pronounced is binding on all parties concerned, unless obtained by fraud or collusion, or unless a subsequent will be discovered.

In common form.

When probate has been granted in common form, any person interested in the property will not be precluded from contesting the validity of the paper at some future date (*n*).

Of what granted.

Probate may be granted of an instrument entirely inoperative, as where a codicil conditioned to take effect only upon an event which does not happen, republishes a will, and is on that ground entitled to probate (*o*).

And probate may be granted of an instrument not distinguished as a will or codicil if the Court be satisfied that the maker intended it to be dependent on his death, and may receive parol evidence in explanation of his intention (*p*).

Several documents.

"The will of a man is the aggregate of his testamentary intentions so far as they are manifested in writing duly executed according to the statute; and as a will, if

(*n*) *Dyer, re*, 1 Hag. Eccl. Rep. 220.
(*o*) *Da Silva*, 2 S. & T. 315.
(*p*) *Robertson* v. *Smith*, L. R. 2 P. & D. 43.

contained in one document may be of several sheets, so it may consist of several independent papers, each so executed," and probate may be granted of the whole, as together forming the will (*q*).

Incorporation of documents.

If a will contain a reference to any deed, paper, memorandum, or other document, a question may arise as to whether it ought not to form a constituent part of the will; but such other document must have been in existence at the time of the execution of the will (*r*).

And in order that an unattested or unexecuted paper may be incorporated, it must be so referred to in the will in such a manner as shall, with the assistance of parol evidence when necessary, leave no doubt as to its identity (*s*).

When a will refers to a paper, it cannot be incorporated with the will unless it is clearly identified with the description of it given in the will, and is shewn to have been in existence at the time the will was executed. Both these matters must be established, and though there may be no doubt about the former, unless the latter also is proved, there can be no incorporation of the paper with the will, and the onus of proving these two matters lies on the person who seeks to make the paper admissible for such a purpose (*t*).

(*q*) *Lemage* v. *Goodban*, L. R. 1 P. & D. 62, per Lord Penzance.
(*r*) Rule 13, P. R. Non-C.
(*s*) *Dickinson* v. *Stidolph*, 11 C. B. (N.S) 341.
(*t*) *Singleton* v. *Tomlinson*, 38 L. T. 653.

It would seem that declarations of intention by a testatrix before the execution of the will, and declaration subsequent thereto, showing her belief that she had effected her intention, are admissible in evidence to show what were the constituent parts of the will at the time of execution (*u*).

Lost will.

Probate may be granted of a lost will, when it can be shewn to have been in existence at the time of the testator's death, and to have been destroyed subsequently or lost, and its contents may be proved, like those of any other lost instrument, by secondary evidence, either by production of the draft, or declarations made by the testator both before and after its execution as to the contents, or even by the evidence of a single witness, though interested, whose veracity and competency are unimpeached; and if the whole contents cannot be proved; probate may be granted to such extent as they can be proved (*x*).

Interlineations.

Alterations and interlineations are invalid unless they existed in the will at the time of its execution, or, if made afterwards, unless they have been executed and attested as required by the statute, or the will has been re-executed, or a subsequent codicil has been made (*y*).

Although when alterations are apparent on the face of a will it cannot be presumed that they were made before execution, and they cannot be admitted to probate with-

(*u*) *Gould* v. *Laker*, 6 P. D. 1.
(*x*) *Sugden* v. *Lord St. Leonards*, L. R. 1 P. D. 154.
(*y*) Rule 8, P. R. Non-C.

out some affirmative evidence that they were in fact so made, yet the Court or jury trying this question of fact is not confined to any particular species of evidence, but may act upon any evidence which, having regard to all the circumstances, reasonably leads the judgment to the conclusion that the alterations were made before execution (*z*).

Initials in margin.

It has been decided that the initials of a testator and the attesting witnesses in the margin of the will opposite interlineations are sufficient to render the interlineations valid (*a*).

The questions now arise as to *when* and *to whom* probate will be granted.

When.

No probate or letters of administration, with the will annexed, shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the judge or by order of two registrars (*b*).

Delay.

Where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit (*c*).

To whom granted.

The executors (if any) are the only persons entitled to

(*z*) *Moore* v. *Moore*, 6 Ir. R. Eq.; and see *Wilkinson, In Goods of*, 6 P. D. 100; *Sturton* v. *Whellock*, 48 L. T. 237.

(*a*) *Blewitt, In Goods of*, L. R. 5, P. D. 116.

(*b*) Rule 43, P. R. Non-C.

(*c*) Rule 45, P. R. Non-C.

take out probate; and their right is not defeasible on insolvency, bankruptcy, or even felony (*d*).

Any person, being of sound mind and understanding, may be appointed executor, as also may a corporation sole, and may take probate in the same manner as an individual; but if a corporation aggregate be so nominated they cannot take probate, but may appoint persons styled *syndics*, to whom administration, with the will annexed, will be granted (*e*).

A firm consisting of several partners may be appointed executors, and since the Naturalization Act, 1870, an alien is equally eligible with a natural born subject.

An infant may be appointed, but in such a case administration with the will annexed will be granted to the guardian of the infant, or to such other person as the Court thinks fit until the infant attains majority.

A married woman may be executrix, and since the Married Women's Property Act, 1882, she alone will be liable for her acts, and it is presumed that the husband cannot intermeddle with the administration.

A person of unsound mind cannot be executor, and the Court may grant administration to a third person (*f*).

Executors may be appointed in two ways; either by name, or according to the tenor of the will.

When executors are appointed by name no difficulty

(*d*) *Smethurst* v. *Tomlin*, 2 Swa. and Tr. 147.
(*e*) Williams on Executors, 8th Ed. 233.
(*f*) Ibid.

can arise, but it is not so easy to decide when a person is executor according to the tenor.

According to tenor of will.

Thus a direction to an individual to receive the property and divide it constitutes him an executor according to the tenor of the will (*g*), but not a direction to pay debts and funeral expenses out of a particular fund (*h*).

And where a will contained a clause to this effect: "I appoint my sister A. B. my executrix, only requesting that my nephews C. D. and E. F. will kindly act for and with this dear sister," it was held that C. D. and E. F. were executors according to the tenor of the will (*i*).

The general rule may be stated to be that to constitute a person executor according to the tenor, there must be a trust to administer the estate generally by him (*k*).

Therefore the universal legatee of a testamentary paper is not entitled to probate as executor according to the tenor (*l*), but a grant of administration with the will annexed will be made to him.

Subsequent appointment.

The testator may give to any person named in the will the power of appointing an executor after his or her death; so where a will concluded thus: "I must beg A. to appoint some one to see this my will executed," it was held that A. might appoint himself (*m*).

Alternative appointment.

Again, a testator may appoint an executor, but on a

(*g*) *Saunders, In Goods of*, 11 Jur. (N.S.) 1027.
(*h*) *Toomy, In Goods of*, 13 W. R. 106.
(*i*) *Brown, In Goods of*, L. R. 2 P. D. 110.
(*k*) *Boardman* v. *Stanley*, 6 Ir. R. Eq. 590 Prob.
(*l*) *Oliphant, In Goods of*, 1 S. & T. 525.
(*m*) *Ryder, In Goods of*, 2 S. & T. 127.

certain event happening, then that another shall stand in his place; thus, where J. J. was appointed executor, "but should he decline or consider himself incapable of acting, then I appoint E. J. to be executor;" it was held that E. J. was substituted executor, if J. J. could not or would not act, and was therefore entitled to probate (*n*).

Renunciation.

Any person appointed an executor is entitled to renounce probate, even if in the lifetime of the testator he has accepted office, but such renunciation must be before he has in any way intermeddled with the estate. Any acts done by the executor in the ordinary course of dealing with the estate of the deceased will constitute intermeddling, and therefore prevent him from renouncing, *e.g.* paying debts, or inserting advertisements in papers for creditors to send in claims on the estate.

The renunciation is filed in the registry, and the form contains a declaration that the party renouncing has not, and will not interfere with the estate of the deceased, but such renunciation need not be under seal (*o*).

A renunciation of executorship is not complete, and may be retracted, at any time before it is filed in the Court (*p*).

And the Court has jurisdiction in a proper case to allow an executor to retract his renunciation even when it is complete (*q*), but he certainly will not be permitted to

(*n*) *Betts, In Goods of*, 30 L. J. (P.) 167.
(*o*) *Boyle, In Goods of*, 3 S. & T. 426.
(*p*) *Morant, or Morand, In Goods of*, 3 L. R. P. 151.
(*q*) *Bell, In Goods of*, 4 P. D. 85.

do so unless he can show that such retraction will be for the benefit of the estate, or of those interested under the will (*r*).

No person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character (*s*).

Before considering what practical steps must be taken to obtain probate, the Customs and Inland Revenue Act, 1881 (*t*) should be here noticed, for several alterations in practice are made thereby.

Duty Stamps.

And, first, by this Act, which came into force on the 1st June, 1881, the amounts payable for probate duty may now be denoted by impressed *or* adhesive stamps; this is an innovation, formerly all probate duty being denoted by impressed stamps.

Stamp on affidavit.

Again, the stamp is not to be affixed to the *probate*, but to the *affidavit* for the Inland Revenue (*u*), and any probate or letters of administration having thereon such a certificate as is thereinafter mentioned is for all purposes to be deemed to have been fully stamped in respect of the value stated in the certificate (*x*).

Certificate on probate.

The certificate mentioned is to be in writing under the hand of the proper officer of the Court, showing that the affidavit for the Commissioners of Inland Revenue has

(*r*) *Gill, In Goods of*, 3 L. R. P. 113.
(*s*) Rule 50, P. R. Non-C.
(*t*) 44 Vict. c. 12.
(*u*) Ibid. s. 27.
(*x*) Ibid. s. 26.

been delivered, and that such affidavit if liable to stamp duty was duly stamped, and stating the amount of the gross value of the estate and effects as shown by the account (*y*).

It may be here mentioned that the gross value as shown by the certificate will be the amount of the whole estate, without any deduction for debts, although, as will be seen hereafter, debts may now be deducted in the first instance.

Debts may be deducted.

On and after the 1st June, 1881, in the case of any person dying domiciled in any part of the United Kingdom, it shall be lawful for the person applying for the probate or letters of administration in England or Ireland, or exhibiting the inventory in Scotland, to state in his affidavit the fact of such domicile, and to deliver therewith, or annex thereto, a schedule of the debts due from the deceased to persons resident in the United Kingdom, and the funeral expenses; and in that case, for the purpose of the charge of duty on the affidavit or inventory, the aggregate amount of the debts and funeral expenses appearing in the schedule shall be deducted from the value of the estate and effects as specified in the account delivered with or annexed to the affidavit, or whereof the inventory shall be exhibited.

The debts to be deducted under this section are to be such as were due from the deceased and payable by law out of any part of the estate and effects comprised in the affidavit or inventory, and are not to include voluntary

(*y*) 44 Vict. c. 12, s. 30.

debts payable on the death of the deceased, or payable under any instrument which shall not have been delivered to the donee thereof three months before the death of the deceased, or debts in respect whereof any real estate may be primarily liable, or a reimbursement may be capable of being claimed from any real estate of the deceased, or from any other estate or person; and the funeral expenses to be allowed are only to be such as are allowable as reasonable funeral expenses according to law (*z*).

Prior to this Act no debts could be deducted in the first instance, except debts secured by mortgage on leasehold property when the mortgage was the only security for the debt.

Provision for small estate.

Where the whole personal estate and effects of any person dying after the 1st of June, 1881, *without any deduction for debts or funeral expenses*, shall not exceed the value of £300, it shall be lawful for the person intending to apply for probate or letters of administration to deliver to the proper officer of the Court, or to any officer of Inland Revenue duly appointed for the purpose, a notice in writing in the prescribed form, setting forth the particulars of such estate and effects, and such further particulars as may be required to be stated therein, and to deposit with him the sum of 15*s.* for fees of court and expenses; and also in case the estate and effects shall exceed the value of £100, the further sum of 30*s.* for stamp duty (*a*).

(*z*) 44 Vict. c. 12, s. 28.
(*a*) Ibid. s. 33.

This section will no doubt afford great relief in cases where the estate is of small value; for when under £100, the only fee payable will be 15*s.*; and when over £100 and under £300, an additional 30*s.* And further, by sect. 36, the payment of the sum of 30*s.* for the fixed duty on the affidavit or inventory in conformity with the Act shall be deemed to be in full satisfaction of any claim to *legacy* or *succession* duty in respect of the estate or effects to which such affidavit or inventory relates.

From the wording of the above section it will be seen, however, that any real estate will still be liable to succession duty, as that species of property would not be included in the affidavit or inventory.

All money legacies pay duty. Exceptions.

Except in cases where the estate is exempt from legacy duty under the 43 Vict. c. 14 (which will be when the whole personal estate is under the value of £100), every *pecuniary legacy*, or *residue*, or *share of residue* under the will, or the intestacy of a person dying on or after the 1st of June, 1881, although not of an amount or value of £20, shall be liable to duty (*b*).

This section only applies to bequests of money, therefore gifts of furniture, &c., will still be exempt when the whole interest given is under £20.

In lieu of the duties formerly payable, the following are substituted:

(*b*) 44 Vict. c. 12, s. 42.

Duties.

Where the estate and effects for or in respect of which probate or letters of administration is or are to be granted, &c., shall be over the value of £100 and not above £500 .	DUTY. £1 for every full sum of £50, and for any fractional sum part of £50 over any multiple of £50.
Where such estate and effects shall be above the value of £500, and one above £500 . .	£1 5s. for every full sum of £50, and for any fractional part of £50 over any multiple of £50.
Where such estate and effects shall be above the value of £1000.	£3 for every full sum of £100, and for any fractional part of £100 over any multiple of £100.

How to be obtained.

Before probate will be granted to executors several preliminaries have to be attended to; the executors must make an affidavit for the Commissioners of Inland Revenue, stating that the parties applying are desirous of obtaining a grant of probate; that the

Affidavit.

account thereto annexed, marked I, is a true account of the particulars and present value of the personal estate and effects of the deceased, and that the gross value is £——; that the deceased had, or had not, any real estate in England, or personal estate situate abroad or elsewhere; that he left, or did not leave, a widow and children him surviving; that the first part of the schedule thereto contains a true list of all debts due from the deceased at the time of his decease, and that the second part of such schedule contains a true account of the funeral expenses; that such debts are justly payable out of the property comprised in the account marked I; and that the aggregate amount of the said debts and funeral expenses is £——, which being deducted from the gross amount mentioned in the account marked I, leaves the sum of £——, upon which duty is payable.

The above form of affidavit is only used when it is intended to deduct debts in the first instance; if it is not intended so to do the form would be altered accordingly.

Oath. They must further make oath and say, that the paper writing referred to in such oath is the original will; that they are the executors; that the testator died on——; that the gross amount of the estate is £——; and that they will faithfully administer the estate; the original will must be engrossed, the above-mentioned papers are then taken to the receiver of wills at Somerset House if in the Principal Registry, or if in a District Registry to the registrar, the duty and fees are paid, and receipts therefore and for the papers deposited are obtained; pro-

bate will then be issued in a few days if all the papers be correct; but the original will remains in the custody of the registry.

Where several persons are named as executors they are not obliged to take probate at the same time, probate may be granted to any one of them, and then leave will be reserved to the others to come in and prove; the grant made to them on their exercising that option is called a double probate. Double probate.

An executor who proves has the right of retaining any debt due from the estate of the deceased to himself before all others of an equal degree. Retainer.

And in an administration suit the right of an executor to retain for his debt is not affected by the circumstance that he is himself the plaintiff suing on behalf of himself and all other the creditors, and that he has submitted to account in the ordinary form of an administration decree (*c*).

And further, in a case where there were three executors, and one of them was also one of two joint creditors, he was allowed to retain in respect of his joint debt. It was argued in this case that the Act abolishing the distinction between specialty and simple contract debts (32 and 33 Vict. c. 46), affected the right of retainer; but Malins V.C., held that the right was not affected (*d*).

But this right of retainer extends only to legal assets, and is not applicable to equitable assets; therefore,

(*c*) *Ex parte Campbell, Campbell* v. *Campbell,* 16 Ch. Div. 198.
(*d*) *Crowder* v. *Stewart,* 16 Ch. Div. 369.

although real estate is by 3 and 4 Will. 4, c. 104, made assets for payment of debts, it is only in equity, and the executor has no right of retainer; nor where real estate has *in the first instance* been sold to pay specialty debts, will the executor be entitled to retain out of personal property subsequently realized, the personal estate being insufficient to pay those debts in full for that species of property is primarily liable (*e*).

Administration with the Will annexed.

Owing to the ignorance or forgetfulness of testators, it sometimes happens that no executor has been appointed by the will; or it may be that the executor named is dead, or refuses to act; the Court in such cases carries out the intention of the testator so far as possible, by appointing a person to administer the estate according to the terms of the will; such person is known as the "administrator with the will annexed." Thus, where a testator gave directions by his will that such a person should be his executor, but after his death no such person could be found, the Court granted letters of administration with the will annexed to one of the residuary legatees, there being no appointment of an executor willing and competent to take probate (*f*).

Executor appointed not known.

Executor dying, or not appearing when cited.

Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and

(*e*) *Walters* v. *Walters*, 18 Ch. Div. 182.
(*f*) *Sawtell, In Goods of*, 10 W. R. 782.

henever an executor named in a will is cited to take
te, and does not appear to such citation, the right
person in respect of the executorship shall
and the representation to the testator and
n of his effects shall and may, without
ciation, go, devolve, and be committed
as if such person had not been appointed

istration with the will annexed is usually granted Court to the person who is most largely interested ne estate, on the supposition that he will perform his uty best. The will itself usually shews who is the largest claimant; when, however, the will does not afford this information, the Statutes of Distribution (*h*) stand in its place and point out the parties. **To whom granted.**

Thus, where a married woman makes a will and appoints no executor, the persons interested under the will are entitled to the grant in priority to the husband, who can only obtain the grant on their renunciation being filed in the registry (*i*).

The residuary legatee having a beneficial interest is always preferred to the next of kin or the legatees, and this is so even when he is only a trustee and there is no residue (*k*). **Residuary legatee.**

And when the residuary legatee has a beneficial inte-

(*g*) 21 & 22 Vict. c. 95, s. 16.
(*h*) 22 & 23 Car. 2, c. 10; 29 Car. 2, c. 3; and 1 Jac. 2, c. 17.
(*i*) *Bailey, In Goods of*, 9 W. R. 540.
(*k*) *Atkinson* v. *Bernard*, 2 Phil. 320.

rest, his personal representatives have the same privilege; but when he is only a trustee, then on his death the administration will go to those having a beneficial interest in the estate.

Administration with the will annexed will be granted to the nominees of a married woman, the residuary legatee, without notice to her husband, when the residue is left to her separate use (*l*).

The Court will not grant administration with the will annexed to the residuary legatee with the consent of the executor. It can only do so on the executor's renunciation of probate, or after a citation has been served upon him, upon his non-appearance within the prescribed time (*m*).

The words "legal heirs and theirs for ever" have been held to constitute the heir-at-law residuary legatee of the personalty as well as the realty, and so to entitle him to a grant of administration *cum testamento annexo* (*n*).

Widow and next of kin.

The widow or next of kin are the persons next entitled when they have an interest in the estate, but in case they have no such interest, their claim to administration may be postponed to those of legatees or creditors, but they, *i.e.*, the widow and next of kin, must be cited (*o*).

Universal legatee.

The universal legatee under a will which does not appoint an executor is entitled to administration with

(*l*) *Pine, In Goods of*, 17 L. T. (N.S.) 31.

(*m*) *Garrard* v. *Garrard*, 2 L. R. P. 238.

(*n*) *Dixon, In Goods of, Todhunter* v. *Thompson*, 4 P. D. 81.

(*o*) *West* v. *Willby*, 3 Phil. 381.

the will annexed, and not to probate according to the tenor (*p*).

To nominees of person having power of appointment.

Where a testator gave all his property to his sole executor upon trust for such persons as B., a married woman, should appoint; the executor renounced, and B. appointed to M. and J., who accepted the trust, all her interest under the will, and her right to letters of administration; letters of administration with the will annexed, were accordingly granted to M. and J. (*q*).

Court for special reason may pass over those entitled.

"Where any person shall have died . . . . leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration . . . . to the person who, if this Act had not passed, would have been entitled thereto, but it shall be lawful for the

(*p*) *Oliphant, In Goods of*, 6 Jur. (N.S.) 256.

(*q*) *Martindale, In Goods of*, 4 Jur. (N.S.) 196.

Court in its discretion to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit" (*r*).

Thus, where a bachelor who had gone to Australia, and who had not been heard of for seven years, and whose father died intestate about two years and five months before the expiration of the seven years, and no representation had been taken out to the father's estate, administration with the will annexed was granted to the sister of the absent man, as one of his next of kin (*s*).

Again, where the Court was satisfied from the facts of the case that the testator intended to deprive his widow of all control over his property, it passed her over, and granted administration with the will annexed to the person indicated (*t*).

But, on the other hand, the Court will not make a grant under this section to a party entitled to a grant in another character, *e.g.*, a creditor (*u*).

Whenever the Court under the above section appoints an administrator other than the person who, prior to the Act, would have been entitled to the grant, the same must plainly appear in the oath of the administrator, in

(*r*) 20 & 21 Vict. c. 77, s. 73.
(*s*) *Peck, In Goods of*, 2 S. & T. 506.
(*t*) *Cosnahan, In Goods of*, L. R. 1 P. & D. 183.
(*u*) *Fairweather, In Goods of*, 2 S & T. 588.

the letters of administration, and in the administration bond (*x*).

General administration will not be granted under sect. 73 above-mentioned to a person who before the Act would only have been entitled to a grant of administration during the minority of an infant; the Court not being empowered under that section to substitute one kind of administration for another, but only to put another person as administrator in the place of the person who would by law have been entitled to administration (*y*).

But the Court will not exercise the power conferred on it by passing over a person entitled to a grant, *i.e.*, the widow and residuary legatee, in favour of a creditor, when the insolvency of the estate is disputed (*z*).

This Act only applies when no representation has been taken out to the estate of the deceased, but the Court has power also to grant in certain cases limited administration when grants have already been made.

Time of issuing grants.

No letters of administration with the will annexed shall issue until after the lapse of seven days from the death of the deceased unless under the direction of the judge or by order of two registrars (*a*).

After three years.

When administration with the will annexed is applied for after the lapse of three years from the death of the

(*x*) Rule 31, P. R. Non-C.
(*y*) *Smith, In Goods of*, 27 L. J. (P.) 105.
(*z*) *Hawke* v. *Wedderburn*, L. P. 1 P. & D. 549.
(*a*) Rule 43, P. R. Non-C.

deceased, the reason of the delay must be certified to the registrars as in the case of probate (*b*).

How obtained. The procedure for obtaining the grant is the same as that already noticed for obtaining probate (*ante*, p. 59), except that, in addition, the administrator must enter into a bond, conditioned in double the value of the estate, for the due administration of the property; and the oath of the administrator is to be so worded as to clear off all persons having a prior right to the grant, and the grant is on the face of it to shew how such prior interests have been cleared off (*c*).

The usual oath of administrators, as well as that of executors and administrators with the will, is to be subscribed and sworn by them as an affidavit, and then filed in the registry (*d*).

Every will, copy of a will, or other testamentary paper, to which an executor or administrator with the will is sworn, must be marked by such executor or administrator, and by the person before whom he is sworn (*e*).

In the oath the administrator (like the executor) must specify the day on which the deceased died; but if this cannot be done, the fact of the decease being certain, the registrars will allow the grant to be made upon a satisfactory explanation that a more precise date cannot be given.

The registrars may in cases where they may deem it

(*b*) Rule 45, P. R. Non-C., *ante* p. 33.
(*c*) Rule 37, P. R. Non-C.
(*d*) Rule 47, 1862.
(*e*) Rule 49, 1862.

necessary, require proof, in addition to the oath of the executor or administrator, of the identity of the deceased or of the party applying for the grant (*f*).

Administration.

As we have previously seen, all jurisdiction over the personal property of deceased persons who died intestate was in the hands of the ordinary, but by the 20 and 21 Vict. c. 77, s. 4, all such jurisdiction and power was vested in the Court of Probate, and now in the Probate, Divorce, and Admiralty Division of the High Court of Justice.

When therefore the deceased has died intestate it becomes necessary to apply for letters of administration to his estate and effects.

All persons who are qualified to act as executors are also qualified to act as administrators, with the exception that as the administrator is required to give a bond as security for the due performance of his office, it follows that all persons who are unable to execute such a bond are in fact disqualified (*g*).

To whom granted.

Prior to the recent Married Women's Property Act, 1882, administration might be granted to a married woman if her husband consented thereto, for he must have signed the administrator's bond, but where a married woman is sole legatee under a will which contains no

Married woman.

(*f*) Rule 48, 1862.
(*g*) Browne on Probate, 159.

appointment of an executor, and the property is left to her separate use, if the husband refused to execute the bond, or to consent to her taking administration, the Court would make the grant to her attorney (*h*).

Cannot prejudice husband's right.

But a wife could not prejudice the right of her husband to claim administration through her, by renouncing her right, for he had an interest, and the grant must follow the interest; therefore the husband was entitled to take out administration in right of the wife to her next of kin deceased intestate, and she could not by renouncing in favour of a third person, *i.e.*, a creditor of the deceased, deprive him of this right (*i*).

But since the Married Women's Property Act, 1882, (45 and 46 Vict. c. 75), a wife may accept the office of executrix or administratrix, and may act therein as if she were a feme sole, and she will be liable in respect and to the extent of her separate property for all breaches of trust and devastavits, and her husband will, it is apprehended, have no right to intermeddle, and will be free from all liability for his wife's acts (*k*).

No person who renounces letters of administration of the personal estates and effects of a deceased person in one character, is to be allowed to take a representation to the same deceased in another character; but this did not apply to the husband of a residuary legatee who signs a renunciation, executed by his wife, merely to signify

(*h*) *Warren, In Goods of*, L. R. 1 P. & M. 538.

(*i*) *Haynes* v. *Matthews*, 1 S & T. 460.

(*k*) Secs. 18, 24; and see Prideaux, 12th Ed. vol. ii., p. 194.

his consent thereto; as a creditor he might take administration, notwithstanding his signature to such a document. And it is presumed that the wife's renunciation would not now in any way affect the husband (*l*).

All persons *non compotes mentis*, being incapable of contracting, cannot execute the bond, and therefore will not be permitted to administer, and this exception also applies to a minor. Lunatics, idiots, &c.

It may be safely alleged that wherever a grant of administration is made to a bankrupt, the Court will require him to give what is termed justifying security, that is, a security greater than would be required in any ordinary case for the due administration of the estate. Bankrupt.

The question of whether or no a felon is disqualified for acting as administrator seems now to be set at rest by the abolition of forfeiture for felony. (Act 33 and 34 Vict. c. 23) (*m*). Felon.

The following is the order in which the next of kin are entitled to claim administration.

1. Husband or wife.
2. Child or children.
3. Grandchild or grandchildren.
4. Great-grandchildren or other lineal descendants.
5. Father.
6. Mother.
7. Brothers and sisters.
8. Grandfathers or grandmothers.

(*l*) Rule 50, P. R. Non-C.; *Biggs, In Goods of*, L. R. 1 P. & M. 538.
(*m*) Browne on Probate, 161.

9. Nephews and nieces, uncles and aunts, great-grandfathers or great-grandmothers.

10. Great nephews, great nieces, cousins-german, great uncles, great aunts, great-grandfather's father, &c., all in the same being equally entitled (*n*).

It follows from the above table that when the deceased was either a bachelor or a spinster, the father will be the first person entitled to the grant of administration.

Persons entitled.

It will be useful to point out the manner and in what shares the estate of a deceased intestate is distributed (*o*).

If the intestate die leaving a husband he will be entitled absolutely to all the estate.

In what shares.

If the intestate die leaving a widow and children, she will be entitled to one-third of the estate, and the children claiming *per capita* to the remainder; and if any child be dead leaving issue, such issue, claiming *per stirpes*, will take the parents' share; if there be no widow the children claim the whole.

If there be no children or descendants the widow will take one-half, and the father as next of kin will take the rest; if no father be living, then the mother, brothers, and sisters, claim in equal shares; if any brother or sister shall have died leaving issue, such issue shall take the parents' share, provided the mother or a brother or sister

(*n*) Coote's Probate Practice, pp. 106, 107; and see Williams on Executors, 8th Ed. pp. 427–431.

(*o*) See 22 & 23 Car. 2 c. 10. 29 Car. 2 c. 1. And 1 Jac. 2 c. 17.

of the intestate be then living, subject in all cases to the widow's moiety.

Beyond the children of a deceased brother or sister, no right of representation exists.

If there be no descendants, father, mother, brothers, sisters, or children of a deceased brother or sister, the widow will take half, and all the next of kin in an equal degree will claim the remainder *per capita*. Next of kin.

Nephews and nieces share with great-grandfathers, great-grandmothers, uncles and aunts, equally, all being in the third degree.

If the intestate leave no widow or child, the father will take all; and if there be no father, brother, or sister, or issue of a deceased brother or sister, the mother will be entitled to the whole, for no other kin than these are entitled to claim against her. If the deceased die leaving a widow, but no next of kin, she will claim half and the remainder will pass to the Crown. No next of kin the Crown will claim.

Bastardy is the most usual cause of there being no kin; for as a bastard is *nullius filius*, he can have no relations, unless he leave lawful issue; therefore on the death of a bastard intestate leaving a widow, she will claim half, and the rest, or when no widow, the whole, will revert to the Crown.

But although this is the rule in cases of intestacy, it is not so where the deceased left a will, for by the 11 Geo. 4, and 1 Will. 4, c. 40, the executors are to be trustees for those who would be entitled under the Statutes of Distribution to any residue not expressly

disposed of; and by the 2nd sect. to that Act it is expressly provided that nothing therein contained shall affect or prejudice any right to which any executor, if that Act had not been passed, would have been entitled, in cases where there is not any person who could claim under the Statutes of Distribution any undisposed of residue; before this statute the rule was that where executors were appointed, and there was no gift of the residue express *or implied*, the executor took the residue beneficially by virtue of their appointment; under this section, therefore, it has been decided that where there is no disposition of residue and there are no next of kin, the executors claim is better than that of the Crown (*p*).

However, the Crown does not claim all the personal effects of a deceased intestate, but after retaining a percentage, varying with the amount of the estate, distributes the remainder among the natural relatives (*q*).

And when a bastard having no relations, makes a will disposing of part only of his or her property, *but without appointing executors or without leaving executors who survive him or her*, the Crown has a right to a grant, save and except, or to a *cæterorum* grant, but not to a general grant of administration, and the legatees have a right to a grant with the will annexed, limited to the property disposed of by the will (*r*).

Wife's representatives.

When the husband survives the wife, but dies without

(*p*) *In re Knowles Rose* v. *Chalk*, 43 L. T. 152.
(*q*) Royal Warrant, 25th July, 1771.
(*r*) *Rhoades, In Goods of*, L. R. 1 P. & M. 119.

administering to her estate, his next of kin must become his legal representatives before they have any claim to administer to the wife's estate (*s*).

In certain cases, however, the Court will pass over the husband without even citing him, as where the wife has obtained a protection order under the 21st sect. of the 20 and 21 Vict. c. 85, and as an order protecting property is to have the same effect as a decree of judicial separation, the cases under the former heading are authorities as to the latter (*t*).

The husband may also be passed over where the wife has obtained a decree of dissolution of marriage (*u*)

And if by the terms of a settlement giving separate property to a married woman the interest of the husband is to cease on the wife's death, he would not be entitled to administer, for the grant following the interest would go to her representatives (*x*).

But it is presumed that the Married Women's Property Act, 1882, does not alter the general rule that a husband is entitled to administer his wife's estate.

Where several next of kin are equally entitled, the Court as a rule will make the grant to the person first applying, without requiring the consent or renunciation of the others equal in degree, such grant is made of the whole property, and no power is reserved, as in probate, *Priori petenti.*

(*s*) *Crause, In Goods of*, 1 S. & T. 146, 5 Jur. (N.S.) 687.
(*t*) *Norman, In Goods of*, 1 S. & T. 513.
(*u*) *Hay, In Goods of*, 13 L. T. (N.S.) 335.
(*x*) *Fielder* v. *Hanger*, 3 Hagg. E. R. 796.

to other parties to come in and administer; and the Court will not in general make a grant to more than three persons, and, indeed, in all cases prefers a sole administration (*y*).

Sole grant preferred.

When the parties are in an equal degree, the Court prefers the male to the female, but not so when such grant is opposed by those who have a majority of interests in the property (*z*).

Whole blood preferred.

In any contest for administration between any person of the whole blood, and one of the half blood, the Court will give the preference to the whole blood (*a*), but when both claimants are of the same degree of blood, administration will as a rule be granted to the one who unites the majority of interests.

Creditor.

A creditor has no right to administration until all parties entitled to the grant in priority to him have been cited to take out letters of administration, and have failed so to do; but he may cite the next of kin to accept administration, or to show cause why it should not be granted to the applicant, although his right of action is barred by the Statute of Limitations, and on their non-appearance he will be entitled to the grant, but the administration bond must be conditioned to distribute the assets rateably amongst the creditors (*b*).

It is a matter of indifference whether he be a creditor

(*y*) *Warwick (Earl of)* v. *Greville*, 1 Phill. 126.

(*z*) *Iredale* v. *Ford*, 7 W. R. 462.

(*a*) *Mercer* v. *Morland*, 2 Lee, 499.

(*b*) *Coombs, In Goods of*, 14 W. R. 975; *Coombs* v. *Coombs*, 15 W. R. 286.

by specialty or simple contract. The creditor before taking a grant must enter into a bond with two sureties to pay the other creditors *pro rata*, the Court *ex officio* requiring it (*c*).

An application by a creditor for a grant of administration of the estate of a deceased intestate must be accompanied by an affidavit of the amount and nature of the debt, and of the date when it was incurred (*d*).

Commorientes.

When two persons claiming in immediate succession to one another have perished in the same calamity, and administration is to be granted to the effects of one of them, the question as to which one survived the other frequently arises. In the absence of all evidence on the point, the presumption is that both parties died at the same moment; but such presumption may be rebutted by evidence sufficient to satisfy the judge that there was a legal survivorship; thus in a case where the question was which of two brothers, James and Charles, died first, and the evidence went to show that "James was an older, more robust and experienced mariner than Charles, and therefore more capable of preserving life on a sudden emergency," the Court came to the conclusion that James survived his brother, and decreed accordingly (*e*).

But in many cases there can be no evidence whatever as to survivorship, and then the rule is that when any

(*c*) *Brackenbury*, L. R. 2 P. & D. 273.
(*d*) *Mauritz von Wesen, In Goods of*, 43 L. T. 582.
(*e*) *Sillick* v. *Booth*, 6 Jur. 142.

party dies possessed of property, the right to any such property passes to his next of kin; and administration will be granted accordingly (*f*).

When granted. No letters of administration shall issue until after the lapse of fourteen days from the death of the deceased, unless under the direction of the judge or by order of two registrars (*g*).

Delay. As with probate, or administration with the will annexed, so with simple administration, when the grant is not applied for within three years of the death of the intestate, the reason of the delay is to be certified to the registrars (*h*).

How obtained. The process of obtaining a grant of letters of administration, is much the same as that already detailed for administration with the will annexed, except that there is no will to be engrossed, and in all three cases it must be remembered that the affidavit of the executor or administrator must have attached to it full particulars of the personal estate of the deceased (*i*).

The bond. The bond given by administrators with the will annexed, or without, is made with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the personal estate of the deceased; such bond shall be in double the amount under which the estate and effects are sworn, unless the Court or the registrar, as the

(*f*) *Satterthwaite* v. *Powel*, 1 Curt. R. 706.
(*g*) Rule 44, P. R. Non-C.
(*h*) Rule 45, P. R. Non-C.
(*i*) 44 Vict. c. 12.

case may be, shall in any case think fit to direct the same to be reduced (*k*).

Administration bonds are to be attested by an officer of the principal registry, by a district registrar, or by a commissioner or other person now or hereafter to be authorized to administer oaths; but in no case are they to be attested by the solicitor of the party who executes them. The signature of the administrator to such bonds, if not taken in the principal registry, must be attested by the same person who administers the oath to such administrator (*l*).

Where the estate is under £20 or £50, it is the practice of the Court to require only one surety to the bond (*m*).

The Court has no power under any circumstances to dispense with the bond altogether (*n*).

But the Court may dispense with sureties taking only the bond of the principal upon sufficient ground being shewn, *e.g.*, where the estate is in the hands of the Court of Chancery (*o*).

Reduction of penalty.

But under the above section (82) the Court has power to direct the amount of the penalty of a bond to be reduced, thus where an administration was taken out for an estate under £20,000, and a bond and a penalty of double that sum was entered into; but an unexpected

(*k*) 20 & 21 Vict. c. 77, ss. 81, 82.
(*l*) Rule 38 (1862).
(*m*) Coote's Probate Practice, p. 99.
(*n*) *Powis, in Goods of*, 34 L. J. (P.) 55.
(*o*) *Cleverly, In Goods of*, 2 S. & T. 335.

addition to the estate being received, it became necessary to reswear the amount under £25,000, the registrars were directed to receive a separate bond in the penalty of £10,000, and that, with the one already executed, should be sufficient (*p*).

And again, where the estate was sworn under £3,000, and the debts of the intestate only amounted to £45, the penalty was reduced, and the administratrix (the only person entitled to the deceased's personalty) was allowed to enter into a bond with sureties for double the amount of the debts (*q*).

Sureties.

Two sureties are always joined in the bond; with one exception, in addition to the one already mentioned, viz., that of a husband or his representative, administering to the estate of the wife, in which case only one surety is joined, whatever be the amount of the estate.

As a general rule sureties to administration bonds are not called upon to justify, but in certain cases they may be; thus the Court may direct justifying security to be given by the administrator if a next of kin apply for it; (*r*) also where a grant is made to a legatee, the Court may direct such security to the extent of the legacy; (*s*) as to creditors, they are not in general entitled to require the securities to justify (that is to

(*p*) *Weir, In Goods of*, 2 L. T. (N.S. 191.
(*q*) *Gent, In Goods of*, 1 Sw. & Tr. 54.
(*r*) *Coppin* v. *Dillon*, 4 Hagg. 376.
(*s*) *Pickering* v. *Pickering*, 1 Hagg. 480.

prove their means); but this rule will be departed from if a strong case be shewn for the departure (*t*).

Duties of executors and administrators.

There is always this important difference with regard to the duties of executors and administrators; that an executor's power being given him by the will, commences from the death, but an administrator, being only an officer appointed by the Court, cannot act until letters of administration are taken out to the intestate's estate.

The following are the duties of executors and administrators alike, and should be discharged in the order given below.

1. The deceased should be buried in a manner suitable to the estate.

2. Probate or administration should be taken out.

3. The goods and effects of the deceased should be collected.

4. The debts should be paid in due order.

5. The executor should then pay the legacies and carry out the instructions in the will; and the administrator should distribute the estate amongst those entitled (*ante* p. 72), and this duty may also fall upon an executor, as where the will has not disposed of all the property (*u*).

Formerly executor took residue for his own benefit.

Prior to the 11 Geo. 4 and 1 Will. 4, c. 40, when no residuary legatee had been appointed by the will, the executor took the undisposed of residue for his own

(*t*) *Hughes* v. *Cook*, 1 Lee 386. Coote's Probate, 100.

(*u*) Browne's Principles and Practice of the Court of Probate, 1873, 206, *et seq.*

benefit, but by that statute it is enacted (*x*) that when any person shall by will be appointed an executor, such executor shall be deemed to be a trustee for the person or persons who would be entitled to the estate under the Statute of Distributions, in respect of any residue not directly disposed of; unless it shall appear by the will, or codicil thereto, that the person so appointed executor was intended to take such residue.

Retainer. An executor who proves, or an administrator, has the privilege of retaining any debt due to him from the estate in preference to any other creditors of equal degree.

But this right of retainer does not constitute him a secured creditor within the meaning of sect. 10 of the Judicature Act, 1875, and his right to retain is not affected by that section (*y*).

Limited grants.

In all ordinary cases of grants of probate, or of administration with the will annexed, or of simple administration, the power given to the personal representatives extends to all the personal estate of the deceased, and lasts for the life of the grantee, and in the case of an executor may be passed on by him after his death; but cases may and do arise in which the circumstances will not warrant the Court in making a full and complete grant, and consequently a grant limited in some particular manner will be issued.

(*x*) Sect. 1.
(*y*) *Lee* v. *Nuttall*, L. R. 12 Ch. Div. 61.

Limited grants may be said to consist of three classes:

1. Grants limited in duration.
2. Grants limited to a particular property.
3. Grants limited to some particular purpose.

In duration.

Where an original will or codicil has been lost, but a true copy has been preserved, the executor may, on proving that such will was executed, and was in existence at the testator's death, but has since been lost, take probate limited until the original will be found, and when the will is in existence at the testator's death, but its contents are not known, administration limited in like manner will be granted (*z*). **Until lost will be found.**

Where at the expiration of twelve calendar months from the death of any testator, if the executor or executors to *whom probate of the will shall have been granted* shall be then residing out of the jurisdiction of the Court; administration "limited for the purpose to become and be made a party to a bill or bills to be exhibited against the administrator in any of his Majesty's Courts of Equity, and to carry the decrees into effect, but not further or otherwise," may be granted upon the application of a creditor, next of kin, or legatee (*a*). ***Durante absentia.***

This Act, it will be observed, only applied to executors who had taken out probate, but by the Court of Probate Act, 1857, this privilege was extended to cases where

(*z*) *Campbell, Re*, 2 Hag. Eccl. Rep. 555.
(*a*) 38 Geo. 3, c. 87, ss. 1, 3.

administration has been granted to a person residing out of the jurisdiction (*b*).

And it is provided by the 18th sect. of the 21 and 22 Vict. c. 95, that "the Act of 38 Geo. III. c. 87, and of the Probate Act, shall be extended to all executors and administrators residing out of the jurisdiction of Her Majesty's Courts of Law and Equity, whether it be or be not intended to institute proceedings in the Court of Chancery, and to all grants made before and subsequently to the passing of the last-mentioned Act." This grant is obtained by making an application to the registrar, supported by affidavit, proving the absence of the executor or administrator, and showing with what property it is proposed to deal, and the administration will usually be limited thereto; the oath and bond are settled in the registry, and the grant is then delivered to the applicant.

All these cases, however, only apply when probate or administration has been already taken out; we have before seen that the Court has power also to grant administration when no representation has been obtained (*ante*, p. 62).

An executor of an executor is within the provisions of the above-mentioned Acts, so that if he reside out of the jurisdiction of the Court of Probate at the expiration of twelve calendar months from the death of the testator, administration may be granted to a creditor, next of kin, or legatee (*c*).

(*b*) 20 & 21 Vict. c. 77, s. 74.
(*c*) *Grant, In Goods of*, L. R. 1 P. D. 435.

Durante dementia.

Where an executor is at the time of probate, or afterwards becomes, lunatic, or where a person entitled to administration becomes lunatic before obtaining the grant, a grant of administration will in general be made to his committee limited to the period of lunacy (*d*).

But the grant of this administration is in the discretion of the Court, no party being of right entitled to it, but the general practice is to give it to the committee, if one has been appointed (*e*).

Such grants cease on the recovery of the lunatic or the death of the administrator, in the first case a fresh grant will be made to the party himself, and in the second to the next of kin or a new committee.

Durante minore ætate.

Where an infant is executor, administration (with the will annexed) will be granted to the guardian of such infant, or to such other person as the Court may think fit, limited to the infant's minority (*f*).

Grants of administration may be made to guardians of minors and infants for their use and benefit, and elections by *minors* of their next of kin or next friend as the case may be, will be required (*g*).

Infants, guardian assigned.

In cases of *infants* not having a testamentary guardian, or a guardian appointed by the High Court of Chancery, a guardian must be assigned by order of the judge, or of one of the registrars; the registrar's order is to be founded

(*d*) *Alford* v. *Alford*, 3 Jur. (N.S.) 990.

(*e*) *Southmead, In Goods of*, 3 Curt. 28.

(*f*) 38 Geo. 3, c. 87, s. 6; and see Williams on Executors, 8th Ed., p. 1, bk. 5, ch. 3, s. 3.

(*g*) Rule 33, P. R. Non-C.

on affidavit, shewing that the proposed guardian is either *de facto* next of kin of the infants, or that their next of kin *de facto* has renounced his or her right to the guardianship, and consents to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the duty (*h*).

Where there are both minors and infants, the guardian elected by the minors may act for the infants without being specially assigned to them, provided the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the judge, or of a registrar (*i*).

Minors, infants.

If the person entitled be under the age of seven years he is an infant, and in that case a guardian must be assigned to him, if over that age, but under twenty-one, he is styled a minor, and may elect his guardian, and where the person entitled to administer is an infant, administration may be granted to some person for the use of the infant, limited to the time of his coming of age.

A father has the first right to the guardianship of his infant children, and next to him persons by him by deed or will appointed, but such persons may for special reasons be disregarded by the Court.

Election, how made.

A minor may make his election either in open Court or by deed duly executed by him, and attested in the usual manner.

(*h*) Rule 34, P. R. Non-C.
(*i*) Rule 35, P. R. Non-C.

But the Court is not bound by the election so made, it may refuse to grant administration to the person chosen, but there must be reasons for the refusal (*k*).

And a testamentary guardian has a right to administration for the use and benefit of minors in preference to the guardian elected by them (*l*).

Pendente lite.

"Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or grant of administration; the Court of Probate may appoint any administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate, and every such administrator shall be subject to the immediate control of the Court and act under its direction" (*m*).

The above provisions now apply to the case of appeals to the House of Lords under the Act (*n*).

But administration *pendente lite* will not be granted without special cause; the necessity for such grant must clearly appear (*o*).

Receiver of real estate.

The Court of Probate may nominate any administrator appointed as aforesaid, or any other person, to be receiver of the real estate of any person, pending suit in the Court

(*k*) *West and Smith* v. *Willby*, 3 Phill. 379.
(*l*) *Morris, In Goods of*, 2 S. & T. 360.
(*m*) 20 & 21 Vict. c. 77, s. 70.
(*n*) 21 & 22 Vict. c. 95, s. 22.
(*o*) *Maskeline* v. *Harrison*, 2 Lee, 258.

touching the validity of any will of such deceased person, by which his real estate may be affected; and such receiver shall have power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate as the Court may direct (*p*).

To a particular Property.

De bonis non. Where an executor to whom probate has been granted, or an administrator, dies before he has fully carried out the trusts of the will, or completed the distribution of the estate, it becomes necessary to provide for the complete carrying out of the object for which the grant was made in the first instance.

In such cases a new representative may be appointed by the Court for the purpose of carrying on the representation.

The grant made in such a case is known as a grant *de bonis non administratis*, or more shortly *de bonis non*.

Chain of representation. No such grant is necessary where an executor, dying before completing the distribution of the estate, appoints an executor of his will, the second executor proving his testator's will becomes *ipso facto* executor of the prior will, keeping up the representation as if by a chain, for an executor is presumed to be a person in whom the testator puts particular trust, and he is therefore permitted to pass on his interest; and the second executor cannot take probate of the one will and renounce the other.

(*p*) 20 & 21 Vict. c. 77, s. 71.

But to make the chain complete, the first executor must have *proved* the will, for where an executor dies without having obtained probate, the right of such executor wholly ceases, and the representation to the estate and effects of the testator devolves as if no executor had been appointed (*q*).

Administrator of executor, or *vice versâ*, no representation.

The rule, however, is different in the case of the executor dying intestate, for the administrator being an officer appointed by the Court cannot be said to be a person in whom the testator reposed any confidence, the chain is therefore said to be broken, and administration *de bonis non* will be granted to the residuary legatee or to others who would have been entitled to an original grant.

It follows from the above that neither the administrator of an administrator, nor the executor of an administrator, is entitled to carry on the representation. The Court will admit into this kind of administration all renunciants of former grants; thus the sole executrix and universal legatee who has renounced probate may afterwards take administration *de bonis non* in the latter character (*r*).

Cestui que trust.

And the Court will grant administration to a cestui que trust limited to the trust fund, when the trustee is dead, and the parties entitled to represent him have been cited, but where there are several parties interested the grant will be limited to the interest of the applicant, unless the other interested parties concur (*s*).

(*q*) 21 & 22 Vict. c. 95, s. 16.
(*r*) *Wheelwright, In Goods of*, L. R. 3 P. Div. 71.
(*s*) *Pegg v. Chamberlain*, 1 S. & T. 527.

And where specific property is bequeathed by a will, which contains no residuary clause, administration with the will annexed may be granted to the legatee limited to the amount of his interest (*t*).

And the Court may grant administration limited to property situated in this country passing under a foreign will on proof that the will is in accordance with the law of the land where made (*u*).

To a particular Purpose.

Ad colligenda bona.

When it appears to the Court that it is necessary on account of the perishable or precarious nature of the property, it will at once make a grant of administration *ad colligenda bona.* The purposes for which such a grant will generally be allowed, are for collecting the effects and personal estate of the deceased, giving receipts for debts when paid, and generally for the doing of any act which cannot be delayed.

Where proceedings in Chancery had been taken by persons having claims on the estate of an intestate against his widow, who was alleged to have possessed herself of part of the estate, but who had not taken out letters of adminstration, a receiver was appointed by the Court of Chancery to collect, get in, and receive the estate, and to apply to the Court of Probate for administration, which, after all parties entitled had been cited, was granted (*x*).

(*t*) *Watson, In Goods of,* 1 S. & T. 110.
(*u*) *Dost Aly Khan, In the Goods of,* 6 P. D. 6.
(*x*) *Mayer, In Goods of,* L. R. 3 P. D. 39.

And it has been decided that where it is for the benefit of the absent or unknown next of kin, the Court will direct an adminstrator *ad colligenda bona* to dispose of the property or any portion of it by sale (*y*).

When the proper representatives of the deceased will not act, and it is necessary that the interests of the deceased should be represented in any proceedings, adminstration, *ad litem*, will be granted. *Ad litem.*

It is enacted by the 15 and 16 Vict. c. 86, s. 44, that if in any suit or other proceeding before the Court of Chancery there shall be no legal personal representative of any deceased person interested in the matters in question, the Court may either proceed without such person, or may appoint some person to represent such estate for the purposes of the suit on such notices, and to such persons as the Court shall think fit, and any order so made shall bind the estate of such deceased person.

Letters of administration with the will annexed, or probate of a will, may be granted by the Court, save and except any particular fund or portion of the estate, whenever the facts of the case require such a limited grant; thus, where a wife has made a will under a power, the Court may *before* the executor has proved the will, grant administration to the husband, save and except such portion as she was empowered to dispose of by will. Save and except.

It is evident that the cases before mentioned of limited grants may not exhaust all the property of the deceased, *Cæterorum.*

(*y*) *Schwertfeger, In Goods of*, L. R. 1 P. D. 424.

and it therefore becomes necessary to apply for a supplemental grant to comprise the remainder of the property, such a grant is known as administration *cæterorum bonorum*; thus, in the instance given above, when the executor of the married woman has already taken limited probate, the husband or his representatives may take administration of the remainder of her property.

As appears above, such a grant if made *before* the executor has taken probate would be a grant save and except.

Cessate.

When administration has been granted limited for some special time, or until some particular event or contingency should happen, it becomes necessary upon the effluxion of the time, or the happening of the event, to issue a new grant, such further administration being known as a *cessate*, or supplemental grant.

Revocation of Grants.

The Court has full power to alter or revoke any grant upon good reason for such alteration or revocation being shewn.

Obtained by fraud.

The grant may be revoked on account of the same having been obtained by fraud, either by having made some directly false statement, or by clandestine and underhand conduct, in having kept back from the knowledge of the Court something of which it should have been informed; or the grant may be revoked by reason of the same having become useless, or that the estate

could not be duly administered if the grant were to remain in force.

The registrars will not revoke a grant where it is possible to rectify an error in it by alteration, and for either purpose they require to be satisfied by affidavit of the necessity.

Grants are revoked in such instances as:—

Where application is made for probate by two or more executors, and one dies before the grant is sealed.

Where a person obtaining the grant is not of full age.

Where administration has been taken on the suggestion that deceased died intestate, and a will is subsequently found.

Grants are altered where the date of death, names or residence of intestate or administrators are incorrect; or where the intestate is described as a bachelor without parent, but in fact died a widower, without child or parent, or in any such case of wrong recital, where the same administrator is still entitled to the grant (*z*).

Caveats.

Any person intending to oppose the issuing of a grant of probate or letters of administration must either personally or by his solicitor enter a caveat in the principal or in a district registry (*a*).

A caveat shall bear date on the day it is entered, and

(*z*) Browne's Probate Practice, p. 265.
(*a*) Rule 59, P. R. Non-C.

shall remain in force for six months only, and then expire and be of no effect, but it may be renewed from time to time (*b*).

Effect of. When a caveat is duly entered, the effect is to prevent any grant of probate or letters of administration being made in respect of the property mentioned in the caveat, but this only lasts so long as the caveat remains in force, or until it is warned.

Warning. When any party is desirous of obtaining a grant, and a caveat has been duly entered, he must obtain from the registrar a warning to the caveat.

Form of. In form, a warning is a notice to the person on whose behalf the caveat was lodged requiring him to enter an appearance within six days, and *warning* him that in the event of no such appearance being entered the Court will proceed to do all such acts, matters, and things as may be needful.

The proceedings now become contentious; it is not proposed to enter into the subject at any length, as the practice is now governed by the orders and rules under the Judicature Acts; but it is hoped that the following may be found of use:—

The first step to take is to issue a writ of summons endorsed with a statement generally of the nature of the claim made or relief sought (*c*).

In probate actions the endorsements shall shew whether the plaintiff claims as creditor, executor, administrator,

(*b*) Rule 60, P. R. Non-C.
(*c*) Jud. Act, 1875, Ord. 1, Rule 1.

residuary legatee, next of kin, heir at law, devisee, or in any and what other character (*d*).

An affidavit verifying the endorsements must be made and filed (*e*).

Appearance must be entered in London at the Central Office, and notice of the appearance entered shall be forthwith given to the Probate Registry (*f*). **Appearance.**

Any person not named in the writ may intervene and appear in the action on filing an affidavit showing how he is interested in the estate of the deceased (*g*).

In case the defendant does not appear the plaintiff may file an affidavit of service, and deliver his statement of claim, and the action is to proceed as if such party had appeared, for he cannot, as in ordinary money claims, sign judgment by default (*h*). **Default of appearance.**

Before a person can be permitted to contest a will the party propounding it has a right to call on him to shew that he has some interest. **Parties must shew their interest.**

The want of interest might be objected to at any time, but more especially before issue joined. As the affidavit verifying the writ and the endorsement of the latter discloses the plaintiff's interest, the objection can, if desirable, be taken after service of the writ (*i*).

The rules of probate pleading of 1862 are repealed, **Pleadings.**

(*d*) Jud. Act, 1875, Ord. 3, Rule 5.
(*e*) Rule 13, C. B., 1862.
(*f*) Rules of Supreme Court, April, 1880.
(*g*) Order 12, Rule 16.
(*h*) Order 19, Rule 9.
(*i*) Dixon on Probate, p. 419.

and the regulations as to pleadings in the other divisions of the High Court of Justice now apply to the Probate Division, it is not, therefore, proposed to state them at length here, but the following points should be noted:—

Statement of claim.

The plaintiff's statement of claim in ordinary cases must be delivered within six weeks from the appearance of the defendant or from the time limited for his appearance in case he has made default, but where the defendant has appeared the plaintiff shall not be compelled to deliver it until the expiration of eight days after the defendant has filed his affidavit as to scripts (*k*).

By rule 30, C.B. 1862, in testamentary causes, the plaintiff and defendant, within eight days of appearance on the part of the defendant, are to file their affidavits as to scripts whether they have or have not any script in their possession.

By rule 31 every script which has at any time been made by or under the direction of the testator, whether a will, codicil draft of a will or codicil, or written instructions for the same, of which the deponent has any knowledge, is to be specified in his affidavit, and every script in the custody or under the control of the party making the affidavit is to be annexed thereto and deposited therewith in the registry.

And by rule 32 no party to the cause, nor his solicitor, shall be at liberty, except by leave of the judge or of one of the registrars of the principal registry, to inspect the affidavits or the scripts annexed thereto, filed by any

(*k*) Order 21, Rule 2.

other party until his own affidavit as to scripts shall have been filed.

Where the plaintiff intends to dispute the interest of the defendant, he should, in his statement of claim, state that he denies the defendant's interest (*l*). Denial of interest.

The party opposing a will may with his defence give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Court of Probate (*m*). Statement of defence.

If the defendant make default in filing and delivering a defence, the action may proceed notwithstanding such default.

The orders and rules under the Judicature Acts applying to trials of probate actions, are not inserted here, and for further information the student is referred to books dealing especially with practice. Trial.

Costs.

The costs of and incidental to all proceedings in the Probate Division are in the discretion of the judge, and he may direct that any party to the suit be condemned

(*l*) *Medcalf* v. *James*, 25 W. R. 63 P. D.
(*m*) Order 22, Rule 11.

to pay all or any part of such costs, provided that where any action issue is tried by a jury, the costs shall follow the event unless upon application made at the trial for good cause shewn the judge before whom such action or issue is tried shall otherwise order (*n*).

(*n*) Supreme Court of Judicature Act, 1875, Order 55; and see *Garnett* v. *Bradley*, 48 L. T. R. 186,

DIVORCE

AND

MATRIMONIAL CAUSES.

DIVORCE

AND

MATRIMONIAL CAUSES.

FORMERLY there was no judicial power in England to grant a dissolution of the marriage contract, for the Canon Law did not admit of such a decree, considering the bond of marriage as indissoluble.

But the Ecclesiastical Courts could grant divorces *à mensâ et thoro* for two causes, adultery and cruelty. Divorce à mensâ et thoro.

A sentence of divorce *à mensâ et thoro* in effect declared "that the said A. B. ought be be divorced from bed, board, and mutual cohabitation with the said C. D., her husband, until they shall be reconciled to each other" (*a*), and cautioned each party not to remarry in the lifetime of each other (*b*).

Some time after the Reformation, an absolute dissolution of marriage was obtained through the medium of a power stronger than the law, viz., by a Private Act of Parliament for each particular case. Private Acts.

(*a*) Conset. 279; Oughton, tit. 215.
(*b*) Can. 107 of 1603.

The system of granting absolute divorces by means of special Acts of Parliament, seems to have commenced with Lord De Roos's case, followed by Lord Macclesfield's and the Duke of Norfolk's in 1698 (*c*).

New Act.

It was, however, found that the law as it then stood would not meet the exigencies of modern society, accordingly an Act was passed known as the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which, after reciting that it was expedient to amend the law relating to divorce, and to constitute a Court with exclusive jurisdiction in matters matrimonial in England, and with authority in certain cases to decree a dissolution of marriage, enacted that "as soon as this Act shall come into operation all jurisdiction now vested in or exercisable by any Ecclesiastical Court or person in England in respect of divorces *à mensâ et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights, or jactitation of marriage, and in all causes, suits, and matters matrimonial, except in cases of marriage licences, shall belong to, and be vested in, Her Majesty, and such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of Her Majesty, in a Court of Record to be called the Court for Divorce and Matrimonial Causes" (*d*).

Now Divorce, &c., Division.

And now, by the 36 & 37 Vict. c. 66, s. 16, the Court for Divorce and Matrimonial Causes is, with the Court of Probate, and the Court of Admiralty, formed into the

(*c*) Roger's Ecclesiastical Law, p. 326, note.
(*d*) Sect. 6.

Probate, Divorce, and Admiralty Division of the High Court of Justice.

And there was assigned to such Division all causes and matters then pending in the Court for Divorce and Matrimonial Causes; and all causes and matters which would have been within the exclusive cognizance of the Court for Divorce and Matrimonial Causes (*e*).

Former rules in force.

All rules and orders in force at the commencement of the Act in the Court for Divorce and Matrimonial Causes are to remain in force except so far as they are expressly varied by the first schedule thereto, or any rules to be made thereafter (*f*).

No alteration has been made in the procedure, for it is provided by rule 62 that "nothing in these rules shall affect the practice or procedure in . . . . proceedings for divorce or other matrimonial causes," the practice therefore remains as formerly. Before inquiring into the powers thus given to the Court, we must first see what circumstances and conditions are necessary to give it jurisdiction, and we find that the following elements must be considered:—

1. Allegiance.
2. Domicil.
3. Place of marriage; and
4. Place of *delictum*.

Allegiance.

1. Allegiance is the tie or *ligamen* which binds the

(*e*) Ibid. s. 34.
(*f*) 38 & 39 Vict. c. 77, s. 18.

subject to the king, in return for the protection which the king affords the subject . . . . which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor of anything but the united concurrence of the legislature (*g*).

Any person born outside the sovereign's dominions is not a subject of, or in allegiance to, that sovereign, unless, indeed, he come within the provisions of any of the Naturalization Acts.

Children of ambassador natural-born subjects.

But the children of an ambassador born abroad have always been held to be natural-born subjects, for the ambassador is presumed to be resident in the country he represents; and any woman married, or to be married, to a natural-born subject, or an alien who has been naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and remedies of a natural-born subject (*h*).

2. Domicil: by this word "we mean home, the permanent home" (*i*).

Definition.

The question of domicil *primâ facie* is more a question of fact than of law (*k*).

"It is obvious, without the light of direct judicial authority, that no nation should arrogate to itself power to dissolve marriage contracts of foreigners not domiciled within its jurisdictional limits, and that no free State,

(*g*) 1 Black. Com. 369.
(*h*) 7 & 8 Vict. c. 66, s. 16.
(*i*) *Wicker* v. *Hume*, 4 Jur. (N.S.) 938, *per* Lord Cranworth.
(*k*) *Bempole* v. *Johnstone*, 3 Vesey. 201.

regardful of its rights or its dignity, should ever, by acquiescence or otherwise, recognize any such assumed right of intermeddling with its domestic institutions by any foreign State." (*l*).

There are three kinds of domicil:

(*a.*) Domicil of origin.
(*b.*) Domicil by choice.
(*c.*) Domicil by law.

Domicil of origin.

Domicil of origin is not necessarily the place of one's birth, but the home of the parents; thus the domicil of origin of the son of an Englishman born during a visit of his parents to foreign parts, would not be that of the actual place of his birth, but would follow that of the father (*m*). To change his domicil of origin a man must voluntarily fix his abode in a country not his country of origin, with the intention of permanently residing there; the domicil so acquired will be put an end to simply by abandoning it, without the necessity of acquiring a new domicil of choice, and the domicil of origin will then revert (*n*).

Where issue is joined on the question of domicil the burden of proof is on the party setting up the abandonment of the domicil of origin (*o*).

Domicil by choice:

Domicil by choice.

The fact of a person living at a certain place is *primâ*

(*l*) *Maguire* v. *Maguire*. 7 Dana's Kentucky Reports, 185.
(*m*) *Somerville* v. *Somerville*, 5 Vesey, 750.
(*n*) *King* v. *Foxwell*, L. R. 3 Ch. D. 518.
(*o*) *Crookenden* v. *Fuller*, 29 L. J. P. & M. 1.

facie evidence that he is domiciled there, and those who wish to deny it must rebut such presumption, but the residence must be voluntary, for a constrained residence in a foreign country will not cause the loss of domicil (*p*). So where a Scotchman entered the English naval service, and remained in it until his death, it was held that he had not lost his domicil of origin (*q*).

Declarations not sufficient.

Mere declarations of an intention to renounce the domicil of origin and acquire a new one, are not sufficient, but there must be in addition an actual residence in the chosen country with the *animus manendi* (*r*).

Thus, where a Frenchman had lived twenty-seven years in England, during the greater part of which time he was a partner in an English house of business, and had married successively two English Protestant wives, though himself a Roman Catholic, and made his will in the English form, and left his property in a manner inconsistent with French law; but upon an action being brought to establish a French domicil, it was proved that he had made several parol declarations of an intention to return to France, when he had made his fortune, it was held that his acts manifested an intention to acquire an English domicil, and that his declarations of intention to return to France, were not sufficient to rebut the conclusions to be derived from the facts of his life, especially of his English marriages (*s*).

(*p*) *D'Orleans* (*Duchess*), *In Goods of*, 1 Sw. & Tr. 253.
(*q*) *Brown* v. *Smith*, 21 L. J. (Ch.) 356.
(*r*) *Aikman* v. *Aikman*, 3 Macq. H. L. Cas. 854.
(*s*) *Doucet* v. *Geoghegan*, L. R. 9 Ch. Div. 441.

The permanent residence of the wife and children is an important consideration in determining the question of a man's domicile (*t*).

Domicil given by the law:

Domicil by law.

By this term is meant the domicil of persons dependent on others, whose domicil will depend on and follow the domicil of those on whom they depend, thus by marriage the domicil of the husband becomes that of the wife, and she cannot acquire a separate domicil for herself, though the husband may have been guilty of misconduct sufficient to found a defence to a suit for restitution of conjugal rights (*u*). A wife's remedy for matrimonial wrongs must be usually sought in the place of her husband's domicil. The English Divorce Court has no jurisdiction in a suit by a wife for restitution of conjugal rights against a foreigner who has quitted this country (*x*).

Husband's domicil becomes that of wife.

And where a woman, deserted by her husband, and having acquired a domicil in England, and instituted a suit for dissolution of marriage on the ground of adultery (committed in Jersey) and desertion, it was held that even if she could acquire a distinct domicil in this country without a decree of judicial separation, she could not make her husband liable to the *lex fori* of her new domicil (*y*).

The husband's domicil is still that of the wife even

(*t*) *Platt* v. *Attorney-General of New South Wales*, L. R. 3 App. Cas. 336.

(*u*) *Yelverton* v. *Yelverton*, 29 L. J. (P. M. & A.) 34.

(*x*) *Firebrace* v. *Firebrace*, L. R. 4 P. D. 63.

(*y*) *Le Sueur* v. *Le Sueur*, L. R. 1 P. D. 139.

where the parties are living apart under a deed of separation, but the presumption fails after a decree of judicial separation.

Father's domicil is child's.

The domicil of a child follows that of the father, and he cannot during his minority acquire another (*z*), and on the death of the father any domicil acquired by the mother becomes that of the infant (*a*).

It will be seen, therefore, that the Courts of the country where the parties are domiciled have power to hear and determine matrimonial causes there; and it has now been decided, that even where the marriage took place in England, the husband being at the time domiciled in Scotland, as the domicil of the husband becomes that of the wife, the Courts in Scotland were properly authorized to grant a divorce, and that the English Court would recognize and act upon it, even when the decree was made upon grounds which would not have sufficed in England (*b*).

Locus contractûs.

3. We have now to consider the *locus contractûs, i.e.*, the place where the marriage was solemnized. "The Court is a Court for England, not for the United Kingdom, or for Great Britain, and for the purposes of this jurisdiction Ireland and Scotland are to be deemed foreign countries, equally with France or Spain" (*c*). Wales and the town of Berwick-on-Tweed are included

(*z*) *Somerville* v. *Somerville*, 5 Vesey. 750.

(*a*) *Pottinger* v. *Wightman*, 3 Mer. 67.

(*b*) *Harvey* v. *Farnie*, 48 L. T. 273.

(*c*) *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 586, *per* Sir C. Cresswell.

in the term England (*d*), but no other towns or districts and no colonies.

As we have seen, the marriage having been solemnized in England, may have great weight in determining a question of domicil, p. 106.

The Court has power to declare void a marriage contracted here where both parties are domiciled abroad, if by the law of the foreign country there is some absolute impediment to the marriage; for "it is a well recognized principle of law that the question of personal incapacity to enter into any contract is to be decided by the law of domicil." The English Court will therefore take note of the foreign law.

But the validity of a marriage in England, one party being domiciled here, must, though the domicil of the other be foreign, be decided according to the law of England; thus, where G. B., a Portuguese, but domiciled in England, married in England J. S., a Portuguese lady, domiciled in Portugal, who was his first cousin, and therefore by the law of Portugal incapable (except by papal dispensation) of contracting marriage with him, the English Court held the marriage valid, and further that the ignorance of the parties as to the effects of Portuguese law upon the validity of the marriage could not affect the marriage (*e*).

4. Place of *delictum*:

This is purely a question of fact, and is taken into consideration in determining questions of jurisdiction.

Place of *delictum*, question of fact.

(*d*) 20 Geo. 2, c. 42, s. 3.

(*e*) *Sottomayor* (*otherwise De Barros*) v. *De Barros*, L. R. 2 P. D. 81; 3 P. D. 1, 5 P. D. 94.

Thus, where the marriage was solemnized at Gibraltar between a Frenchman and an Englishwoman, but the husband's domicil was French, and the wife presented a petition for dissolution of marriage on the grounds of adultery and desertion, on its being proved that the adultery and the greater part of the desertion occurred in England, it was held that the Court had power to dissolve the marriage (*f*).

The jurisdiction of the Court is beyond doubt when all the before-mentioned ingredients are English, nor can there be any doubt as to the failure of the jurisdiction when none of such essentials are present.

Allegiance. An English-born subject does not by acquiring a foreign domicil throw off his allegiance to the Crown, and may still take advantage of, and is subject to, its laws; thus where two English-born subjects were married in England, but the husband acquired a domicil in America and there committed adultery, it was held that the Court had jurisdiction to dissolve the marriage (*g*).

In this case it will be seen the allegiance and *locus contractûs* alone were English.

Domicil. When the husband is domiciled in England, but the marriage was solemnized between foreigners, in a foreign country, and the marital offence complained of also took place abroad, the Court has jurisdiction to dissolve the

(*f*) *Niboyet* v. *Niboyet*, L. R. 4 P. Div. 1.
(*g*) *Deck* v. *Deck*, 29 L. J. (P. M. & A.) 129.

marriage; thus domicil alone is sufficient to give the Court jurisdiction (*h*).

Place of marriage.

The Court has also power to inquire into the validity of a marriage contracted in this country between foreigners domiciled abroad (*i*); for this purpose, therefore, the place of marriage being English will give the Court power to make the decree of nullity sought for.

Whether the Court would have the power to dissolve a marriage, when the place of marriage alone is English, appears now to be decided by the case of *Sottomayer* v. *De Barros* (*ante*, p. 109), and in another case where the marriage took place in England, but the evidence adduced was not sufficiently clear to prove the domicil foreign, the Court did not consider itself bound to inquire into the question of jurisdiction, and accordingly made the decree (*k*).

Locus delicti.

And it has now been decided in the recent case of *Niboyet* v. *Niboyet* (p. 110) that when either party is an English subject, and the whole or part of the *delictum* occurs here, the Court has jurisdiction to dissolve the marriage.

Must appear under protest.

When a respondent wishes to object to the jurisdiction of the Court he should appear under protest, for if he appear absolutely, he will not be allowed afterwards to dispute the jurisdiction of the Court (*l*).

Nor can any respondent who has entered an absolute

(*h*) *Brodie* v. *Brodie*, 30 L. J. (P. M. & A.) 185.
(*i*) *Simonin* v. *Mallac*, 2 L. T. (N.S.) 327; and see p. 72.
(*k*) *Bond* v. *Bond*, 8 W. R. 630; and see p. 72.
(*l*) Ibid. and see Rule 22.

appearance withdraw it, for the purpose of appearing under protest to enable him to plead to the jurisdiction (*m*).

Lunatics.

It is now decided that the lunacy of the respondent is no answer to a suit for dissolution of marriage, and that under the 31st sect. of the 20 & 21 Vict. c. 85, a husband is absolutely entitled to a decree of dissolution, on proof of the wife's adultery, unless any of the acts mentioned hereafter as absolute or discretionary offences are proved against him (*n*).

Committee may act.

A committee duly appointed of a person found by inquisition to be of unsound mind, may take out a citation, and prosecute a suit on behalf of such person as a petitioner, or enter an appearance, intervene, or proceed with the defence of such person as a respondent; if no committee has been appointed, application is to be made to a registrar, who will assign a guardian to the person of unsound mind for the above purposes (*o*).

Minors.

A father may be appointed guardian *ad litem* to his son, a minor, to obtain a divorce by reason of the wife's adultery (*p*). And a minor above the age of seven years may elect any one or more of his or her next of kin or next friends as guardians, for the purpose of proceeding on his or her behalf as petitioner, respondent, or intervener in a cause, but when under that age a

(*m*) *Moore* v. *Moore*, 5 Ir. R. Eq. 371, Mat. Ca.
(*n*) *Mordaunt* v. *Moncrieffe*, L. R. 2 H. of L. Sc. App. 374.
(*o*) Rule 196.
(*p*) *Morgan* v. *Morgan*, 2 Curt, 679.

guardian shall be assigned to him by one of the registrars (*q*).

In cases, then, where the Court has jurisdiction it is empowered to dissolve a marriage (1) on the petition of the husband, on the ground that since the celebration of the marriage the wife has been guilty of adultery; and (2) on the petition of the wife, showing that since such marriage the husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or beastiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *à mensâ et thoro;* or of adultery coupled with desertion without reasonable excuse for two years or upwards (*r*). Dissolution, grounds for.

Where an undefended suit (in which no appearance had been entered on behalf of the respondent) for dissolution on the ground of the respondent's adultery and cruelty was part heard, and the Court was satisfied with the evidence adduced on behalf of the petitioner in confirmation of the charge of adultery alleged against the respondent, but adjourned the case for the production of further evidence as to the alleged charges of cruelty, the Court granted leave to amend the petition by adding the charge of desertion, the requisite two years, though complete at the time of making the application, not having been completed until subsequent to the filing of the petition in the suit (*s*).

(*q*) Rules 105, 107.
(*r*) 20 & 21 Vict. c. 85, s. 51.
(*s*) *Kettlewell* v. *Kettlewell*, 41 L. T. 739 P. D.

The Court is empowered in addition to the power of dissolving marriages before mentioned, to pronounce the following principal decrees:

1. Judicial separation (*t*).
2. Nullity of marriage (*u*).
3. Jactitation of marriage (*t*).
4. Restitution of conjugal rights (*u*).

And also the following subsidiary decrees:

5. Alimony to the wife: (*u*)
6. Settlements to be made on the innocent party (*x*).
7. That the custody of any children be given to either party, and as to their maintenance and education (*y*).
8. Damages against an adulterer, and as to their application (*z*).
9. That a decree of judicial separation already obtained be reversed (*a*).

Petition by wife.

To enable a wife to obtain a decree for dissolution of marriage we have seen that it will not be sufficient for her to prove adultery only, on the part of the husband, but there must be in conjunction therewith some one or more of the additional offences required by the Act (*b*),

(*t*) 20 & 21 Vict. c. 85, ss. 6, 7, 16.
(*u*) Ibid. s. 32.
(*x*) Ibid. s. 45.
(*y*) Ibid. s. 35.
(*z*) Ibid. s. 33.
(*a*) Ibid. s. 23.
(*b*) *Ante*, p. 113.

but that adultery alone on the part of the wife will enable the husband to obtain a dissolution.

Antenuptial adultery cannot be charged as a ground for dissolution, even in conjunction with adultery and cruelty subsequent to the marriage (*c*).

Defences absolute.

There are two classes of defences to this petition— absolute and discretionary.

The absolute defences, *i.e.*, defences on which being proved the Court is bound to dismiss the petition, are:

1. An absolute denial of the facts alleged.
2. Connivance.
3. Collusion.
4. Condonation.

Discretionary.

The discretionary defences are:

1. Adultery of petitioner.
2. Unreasonable delay in presenting or proceeding with the petition.
3. Cruelty by the petitioner.
4. Desertion or wilful separation without reasonable excuse before the adultery.
5. Such wilful misconduct as has conduced to the adultery (*d*).

Absolute denial; no affidavit.

Little need be said as to an absolute denial of the fact, which denial may be of any material fact, as the adultery, the marriage, &c. This defence being a bare denial need not be accompanied by any affidavit (*e*).

(*c*) *Fitzgerald* v. *Fitzgerald*, 11 W. R. p. 85.
(*d*) Browne on Divorce and Matrimonial Causes, p. 92.
(*e*) Ibid. p. 87.

Every answer which contains more than a bare denial of facts must be accompanied by an affidavit verifying the additional matter, such affidavit being filed with the answer (*f*).

Connivance.

Connivance arises where the husband encourages or permits certain intercourse, or leaves the wife in such a position that adultery is the natural consequence, and he intended that such should be the result.

But it is not sufficient that the husband's conduct actually occasioned the wife's adultery, but it must be shewn also that he intended it should have that effect (*g*).

Intention.

It is purely a question of intention, therefore thoughtless conduct on the part of the husband, if unaccompanied by wrongful designs, will not constitute connivance (*h*).

But where the husband knowing that the wife is living in adultery, takes no steps to terminate such connection nor in any way interferes with her actions, he is guilty of connivance (*i*).

And if a person employed by the husband to watch his wife for the purpose of obtaining evidence of her adultery, brings about an act of adultery, the husband cannot obtain a decree of dissolution on the ground of such adultery, although he may not have directed or authorized his agent to bring it about (*k*).

And a husband who, in consideration of the co-re-

(*f*) Rule 30, 1865.
(*g*) *Harris* v. *Harris*, 2 Hag. 376.
(*h*) *Hoare* v. *Hoare*, 3 Hag. 137.
(*i*) *Michelson* v. *Michelson*, 3 Hag. 147.
(*k*) *Gower* v. *Gower and others*, 2 L. R. P. 428.

spondent's agreement to pay him a sum of money, withdraws from a suit for dissolution of marriage on the ground of adultery of the wife, without condoning her offence by resuming cohabitation, or stipulating for her future good conduct, or making a provision for her maintenance, is guilty of connivance, and cannot maintain a suit for dissolution of marriage on the ground of the wife's subsequent adultery with the same person (*l*).

Collusion. Definition.

Dr. Lushington described collusion to be the permitting of a false case to be substantiated, or keeping back a just defence.

Collusion, as contemplated by the statute 20 & 21 Vict. c. 85, appears to have a wider scope than formerly, and will include a conspiracy in presenting, or proceeding upon, the petition, whereas formerly, collusion meant an agreement between the parties to commit the offence itself (*m*).

It was held by the Court in the case of *Barnes* v. *Barnes* that the fact that the husband before and after the institution of the suit, had frequently given the wife money not to oppose the suit, established collusion (*n*).

A husband before commencing a suit for dissolution agreed with his wife that if the petition were not opposed he would pay all costs; the Court held that the parties were guilty of collusion (*o*).

(*l*) *Gipps* v. *Gipps*, 33 L. J. (P. M. & A.) 161.
(*m*) Pritchard's Law and Practice of the Divorce Court, pp. 6, 82.
(*n*) 37 L. J. (P. & M.) 86.
(*o*) *Bacon* v. *Bacon*, 25 W. R. 560.

An agreement between the parties that relevant evidence shall be withheld amounts to collusion (*p*).

Petitioner must be party to collusion.

But the petitioner must be a party to the collusion, therefore where the wife and the adulterer made arrangements to which the petitioner was not a party, the bill was passed (*q*).

Condonation. Definition.

"Condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances" (*r*). Dr. Lushington says: "A return to connubial intercourse is *primâ facie* a condonation of past adultery and previous cruelty" (*s*).

There need not, however, be express words of forgiveness; acts are sufficient, and indeed words, however strong, can at the highest only be regarded as imperfect forgiveness, and unless followed by something which amounts to a reconciliation and to a reinstatement of the wife in the condition she was in before she transgressed, it must remain incomplete (*t*).

Forgiveness on condition only.

But condonation is not absolute forgiveness, but forgiveness only on the implied condition that the offence shall not be repeated, and that the other party shall be treated with conjugal kindness, and therefore on the commission of a subsequent offence the prior condoned

(*p*) Hannen, P., in *Bacon* v. *Bacon*, 25 W. R. 560.

(*q*) Browne on Divorce, p. 114; *Re Matthyssen's Divorce*, 78 H. of L. Journal, 851.

(*r*) *Peacock* v. *Peacock*, 27 L. J. (P. & M.) 70, *per* the Judge Ordinary.

(*s*) *Snow* v. *Snow*, 2 Notes of Cases Suppl., 113.

(*t*) *Keats* v. *Keats*, 28 L. J. (P. & M.) 78, *per* Lord Chelmsford.

offence will be revived, nor need the offences be *ejusdem generis*. Thus, where the adultery complained of in the petition for dissolution has been condoned, it will be revived by subsequent cruelty (*u*), and adultery will revive prior cruelty (*x*). The rule, however, as to the revival of condoned cruelty is somewhat different. Dr. Lushington in *Evans* v. *Evans* (*y*) lays it down that the general principle recognized by various decisions (though there may be some exceptions) "is that in order to revive cruelty that has been condoned there must be something of the same kind—it is not necessary that it should be so strong as the original cruelty, but something to shew that the husband continues of the same disposition, and in the same state of mind, and that there is a well-grounded fear that he would be guilty of the same acts of cruelty originally complained of."

Revival of condoned offence.

So condoned cruelty is not revived by subsequent desertion (*z*).

And where a wife had entered into a voluntary deed of separation, in which it had been covenanted on her behalf that she should not in any future proceedings against her husband plead any offence which had been then committed by him, and she had subsequently filed a petition for dissolution of her marriage on the grounds of his adultery and cruelty, but had failed to establish the

(*u*) *Durant v. Durant*, 1 Hag. 761.
(*x*) *Palmer* v. *Palmer*, 22 L. J. (P. & M.) 124.
(*y*) 2 Notes of Cases, 474.
(*z*) *Hart* v. *Hart*, 2 Spink, E. & A. 193.

cruelty alleged to have been committed subsequent to the date of execution of the deed of separation; it was held that the covenant was binding on her, and that the subsequent adultery did not revive the previous cruelty, and therefore she was only entitled to a decree of judicial separation (*a*).

But subsequent adultery will revive previously condoned desertion (*b*).

We now come to discretionary defences, *i.e.*, defences on which, when proved, the Court may or may not dismiss the petition.

Adultery of petitioner.

Adultery of the petitioner: the Court has a discretion under the 31st section of the Act whether to pronounce the decree or not, upon such adultery being proved; but such liberty is only exercised according to certain rules.

Court bound by rules.

Lord Penzance, in the case mentioned below (*c*), states that "there are cases in which the adultery has been committed under such circumstances that it ought not in justice to stand in the way of a decree." Thus, where the respondent, who was living in adultery, contrived to make the petitioner believe she was dead; on this he married again, then finding his mistake he sued for a divorce, the adultery of the petitioner on the second marriage was held not to deprive him of his remedy (*d*).

Also, where the adultery was committed through fear

(*a*) *Rose* v. *Rose*, 7 P. D. 225.
(*b*) *Blandford* v. *Blandford*, 48 L. T. 238.
(*c*) *Morgan* v. *Morgan and Porter*, 17 W. R. 688.
(*d*) *Joseph* v. *Joseph*, 13 W. R. 291.

of the husband's threats or in consequence of his violence (*e*).

Again, where a decree *nisi* having been pronounced, the petitioner married again, being under the impression that he might legally do so, the Court in its discretion made the decree absolute (*f*).

2. Unreasonable delay in presenting or proceeding upon the petition. Delay.

The Court is not bound to pronounce the decree if it shall be satisfied that the petitioner has been guilty of unreasonable delay in presenting or prosecuting the petition (*g*).

It is not, however, in every case that delay is a bar to relief, but it is an important ingredient, and must be explained, or the Court will not grant relief (*h*).

Thus it has been held that want of means was a sufficient excuse, although many years had elapsed between the adultery and the presentation of the petition (*i*). Want of means, good reason.

And in a recent case the petitioner obtained in 1878 a decree of judicial separation, but declined to take a decree of dissolution, as he expected his wife would return to him. This, however, she did not do, and in 1882 the petitioner asked for a decree of dissolution of marriage, which was refused on the ground of delay, but

(*e*) *Coleman* v. *Coleman*, 14 W. R. 291.
(*f*) *Noble* v. *Noble and Godman*, L. R. 1 P. & D. 691.
(*g*) 20 & 21 Vict. c. 85, s. 31.
(*h*) *Boulting* v. *Boulting*, 33 L. J. (P. M. & A.) 33.
(*i*) *Harrison* v. *Harrison*, L. R. 3 P. & M. 193.

on appeal the Court allowed the petitioner to give in evidence as reasons for the delay want of means and his hopes that the wife would return, and made the decree *nisi*, the previous decree of judicial separation being held to be no bar (*j*).

Also, inability to give evidence.

Again, where the adultery complained of was committed in 1866, but the petitioner was unable to give evidence in his own behalf (which evidence was material) until after 1869, when the Evidence Act, 1869 (*k*), enabled him so to do, the delay was held to be duly accounted for (*l*).

Cruelty.

3. Cruelty by the petitioner. It is in the option of the Court whether or not to pronounce the decree if it appear that there has been cruelty by the petitioner (*m*).

What is.

As to what constitutes cruelty, it is stated that the causes must be grave and weighty, and such as shew an absolute impossibility that the duties of married life can be discharged. Proof must be given of a reasonable *apprehension* of bodily hurt, the Court is not to wait until the injury is actually done, but the apprehension must be reasonable, not merely arising from diseased sensibility of mind (*n*).

It is not requisite that there should be many acts, for if one act should be of that description that it may be

(*j*) *Mason* v. *Mason*, 48 L. T. 290.
(*k*) 32 & 33 Vict. c. 68, s. 3.
(*l*) *Wilson* v. *Wilson*, L. R. 2 P. & M. 435.
(*m*) 20 & 21 Vict. c. 85, s. 31.
(*n*) *Evans* v. *Evans*, 1 Consist. Rep. p. 37, *per* Lord Stowell.

considered likely to occur again, and to occur with real suffering, that will authorize the Court to interfere (*o*).

Indirect or constructive.

Again the cruelty complained of may be indirect, thus if the husband so grossly illtreat a child in the presence of the mother as to affect her health, he would be guilty of constructive cruelty (*p*).

Desertion.

4. Desertion or wilful separation without excuse before the adultery.

Desertion when pleaded as a defence to a suit for dissolution need not be for two years, or, indeed, for any stated time (*q*).

What is.

It seems that the desertion contemplated by the section means something equivalent to leaving the respondent *destitute* (*r*).

But a husband may be guilty of desertion, even if he do not leave the wife absolutely destitute; thus if the cohabitation be put an end to without the consent of the wife, and without any intention of renewing it, the offence may be complete, for she is entitled to her husband's society, and the protection of his name and home (*s*).

What is reasonable excuse.

To constitute a reasonable excuse the reason alleged must be a grave and weighty one, and upon which the Court could found a decree of judicial separation; thus

(*o*) *Westmeath* v. *Westmeath*, 2 Hag. Suppl. p. 71.

(*p*) *Birch* v. *Birch*, 21 W. R. 463; *Manning* v. *Manning*, 6 Ir. R. Eq. 417.

(*q*) Browne's Law & Prac. in Divorce and Mat. Causes, p. 117.

(*r*) *Haswell* v. *Haswell*, 29 L. J. (P. & M.) 21.

(*s*) *Yeatman* v. *Yeatman*, L. R. 1 P. & D. 489.

cruelty or adultery would constitute reasonable excuses. And perhaps also gross habits of intoxication, ungovernable fury of temper, gross impropriety of conduct falling short of adultery (*t*).

But mere frailty of temper is not sufficient (*u*).

And where a husband obtained from his wife an agreement that they should live apart from each other, which they accordingly did, and she subsequently committed adultery, it was held that under the circumstances he had deserted her, and that a petition by him for dissolution of the marriage must be dismissed (*x*).

But where the husband had left the wife for the purpose of finding employment, but could not, and did not support her, it was held that this was not desertion, "the husband not having wilfully absented himself, but of necessity" (*y*).

Neglect or misconduct.

5. Such wilful neglect or misconduct as has conduced to the adultery.

The Court may refuse to make the decree on this being proved (*z*).

Must conduce to adultery directly.

The wilful misconduct must *directly* conduce to the adultery; thus, where the husband had been sentenced to transportation, and during his absence the wife was

(*t*) Pritchard on Div. p. 9.

(*u*) *Yeatman* v. *Yeatman*, L. R. 1 P. & D. 489.

(*x*) *Dagg* v. *Dagg*, 7 P. D. 17. For an instance of a "reasonable excuse" see *Proctor* v. *Proctor*, 34 L. J. (P. M. & A.) 99.

(*y*) *Thompson* v. *Thompson*, 27 L. J. (P. & M.) 65.

(*z*) 20 & 21 Vict. c. 85, s. 31.

guilty of adultery, it was held that this absence though the indirect, was not the direct cause (*a*).

The conviction and imprisonment of a wife for an offence against the criminal law is no justification for refusing further to cohabit with her, and if such refusal tends to bring about her adultery the Court will not grant her husband a decree for dissolution of their marriage (*b*).

But where the husband, having married a woman of loose character, separated from her without reasonable excuse, and induced her to reside in chambers in Regent Street, away from all friends, it was held that his misconduct in placing her in such temptation, had directly conduced to the adultery (*c*).

A husband and wife are competent to make a binding agreement for compromise of a divorce suit, and may do so during the course of the trial, and the Court (Chancery Division) have power to enforce specific performance of such an agreement without infringing the Judicature Act prohibiting interference with proceedings pending in another branch of the Court (*d*).

The *decree nisi* in first instance.

It is enacted by the 23 & 24 Vict. c. 114, s. 7, that every decree for a divorce shall in the first instance be a decre *nisi*, not to be made absolute till after the expiration of such time, not less than *three months* (*e*), from the

(*a*) *Cunnington* v. *Cunnington and Noble*, 28 L. J. (P. & M.) 101.
(*b*) *Williamson* v. *Williamson*, 46, L. T. 920.
(*c*) *Baylis* v. *Baylis, Teevan, and Cooper*, 2 L. J. (P. & M.) 89.
(*d*) *Hart* v. *Hart*, 18 Ch. Div. 670.
(*e*) 29 & 30 Vict. c. 32, s. 3, enlarged this time to six months.

pronouncing thereof, as the Court shall by general or special order from time to time direct, and during that period *any* person shall be at liberty to shew cause why the said decree should not be made absolute, by reason of the same having been obtained by collusion, or that material facts have not been brought before the Court, and the Court may then make the decree absolute, or reverse the decree *nisi*, or require further inquiry, or otherwise, as justice may require, and that at any time before the decree is made absolute any person may give information to her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary; and if from such information the said proctor shall suspect that any of the parties to the suit have been acting in collusion, for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General and by leave of the Court, intervene in the suit, alleging such collusion, and retain counsel, and subpœna witnesses to prove it, and the Court may order the costs thereof to be paid by the parties, including a wife if she have separate property.

Intervention.

Any person may intervene.

Under this enactment it will be seen that any person may intervene, even any one of the general public, having no interest in the case, and the Queen's Proctor may intervene either in his official capacity or as a private individual; but it was decided (*f*) that when he

(*f*) *Bowen* v. *Bowen and Evans*, 3 Sw. & Tr. 530.

intervened as only one of the general public, the Court had no power to condemn the petitioner in the costs of the intervention; this has, however, been altered, for by the Matrimonial Causes Act, 1878 (41 Vict. c. 19), it is enacted (*g*) that where the Queen's Proctor or *any other person* shall intervene or shew cause against a decree *nisi*, or proceeding for nullity of marriage, the Court may make such order as to the costs of the Queen's Proctor, or of *any other person* who should so intervene, as may seem just, and the Queen's Proctor, or any other person as aforesaid, shall be entitled to recover such costs in like manner as in other cases. Costs.

The Queen's Proctor intervening is not limited to the plea of collusion, but may plead any matter material to the due decision of the case (*h*).

The Court has power to shorten the period between the decree *nisi* and the decree absolute, but in the absence of special circumstances will not do so, even by a few days, although such refusal shall have the effect of delaying the decree absolute for three months, and the application may have only been rendered necessary from the fact that during a whole term the Court had been unable to take cases in the list in which the suit had been entered (*i*). As an instance of "special circumstances," the case of *Fitzgerald* v. *Fitzgerald* may be cited, where it was considered that the Queen's Proctor having intervened twice,

(*g*) Sect. 1.
(*h*) *Sottomayer* v. *De Barros*, 5 P. D. 94.
(*i*) *Rippingall* v. *Rippingall*, 48 L. T. 126.

the object of suspending the decree absolute had been fully attained (*k*).

Where the Queen's Proctor has intervened, and thereupon the suit has been abandoned without payment of costs, the Court will order the matter to be placed in the reserved lists until payment of the Queen's Proctor's costs (*l*).

Status of parties.

The decree when made is, as we have seen, only *nisi* in the first instance, and it would seem that between the period of the decree *nisi* and the decree absolute (six months) the parties are considered as still married, that is so far that any illicit connection either party may form is adultery, and the Court on the application to make the decree absolute must take notice of all material facts up to that time (*m*), not previously brought before it, and consequently any adultery committed subsequently to the decree and *nisi;* such adultery therefore becomes a discretionary defence (*n*).

But where the petitioner, having obtained a decree *nisi*, married again, believing that the decree had been made absolute, the Court, the Queen's Proctor not opposing, made the decree absolute (*o*).

Decree made absolute only at suit of innocent party.

The decree *nisi* can only be made absolute at the suit of the innocent party, therefore a wife proved to have committed adultery cannot apply for the decree

(*k*) 31 L. T. 270.
(*l*) *Collins* v. *Collins*, 44 L. T. 31.
(*m*) 23 & 24 Vict. c. 144, s. 7.
(*n*) *Hulse* v. *Hulse and Tavernor*, L. R. 2 P. & D. 259.
(*o*) *Wickham* v. *Wickham*, 6 P. D. 11.

to be made absolute though the husband delay doing so (*p*).

Where a decree *nisi* has been pronounced, but the respondent has obtained a new trial, with, however, a like result to the first, the Court will, the Queen's Proctor not intervening, make the decree absolute at the expiration of six months from the *first* trial (*q*).

Neither party to the suit is at liberty to marry again before the decree is made absolute, or where there is a right of appeal, until either the time limited for appealing has passed, or the result of the appeal is that the marriage is declared to be dissolved (*r*).

In all cases, except petitions for dissolution or for nullity of marriage, the aggrieved party had formerly a right of appeal to the full Court, but since the Supreme Court of Judicature Act, 1881, these appeals now lie to the Court of Appeal, and from thence, in some cases, as will be seen later on, to the House of Lords (*s*).

In the cases of petitions for dissolution or for nullity of a marriage the appeal lies to the House of Lords direct, for by 31 and 32 Vic. 77 s. 3 it is enacted that—

Appeal.

Either party dissatisfied with the final decision of the Court on any petition for dissolution, or nullity, may within one month from the pronouncing thereof appeal therefrom to the House of Lords, and on the hearing of

(*p*) *Ousey* v. *Ousey*, L. R. 1 P. Div. 56.
(*q*) *Sheffield* v. *Sheffield*, 29 W. R. 523.
(*r*) 20 & 21 Vict. c. 85, s. 57.
(*s*) 44 & 45 Vict. c. 68, s. 9.

any such appeal, the House of Lords may either dismiss the appeal or reverse the decree, or remit the case to be dealt with in all respects as the House of Lords shall direct; provided always, that in suits for dissolution of marriage, no respondent or co-respondent not appearing and defending the suit on the occasion of the decree *nisi* being made shall have any right of appeal to the House of Lords against the decree when made absolute, unless the Court upon application made at the time of the pronouncing of the decree absolute shall see fit to permit an appeal.

"The decision of the Court of Appeal on any question arising under the Acts relating to divorce and matrimonial causes, or to the declaration of legitimacy, shall be final, *except* where the decision either is upon the grant or refusal of a decree on a petition for dissolution or nullity of marriage, or for a declaration of legitimacy, or is upon a question of law on which the Court of Appeal give leave to appeal, and save as aforesaid no appeal shall lie to the House of Lords under the said Acts."

Subject to any order made by the House of Lords in accordance with the Appellate Jurisdiction Act, 1876, every such appeal is to be brought within one month after the decision appealed against is pronounced by the Court of Appeal of the House of Lords in their sitting, or if not then, within fourteen days after the House of Lords next sits (*t*).

No appeal from an order *absolute* for dissolution or

(*t*) 44 & 45 Vict. c. 68, s. 9.

nullity of marriage, shall henceforth lie in favour of any party who, having had time and opportunity to appeal from the decree *nisi* on which such order may be founded, shall not have appealed therefrom (*u*).

Where there is no right of appeal the parties are at liberty to marry again at any time after the decree absolute (*x*).

All parties to the suit in which the decree appealed against was made should be cited to appear in the appeal.

Choses in action of wife's separate property.

After a decree of divorce the choses in action of the wife which have not been reduced into possession belong to the wife absolutely (*y*).

A married woman who has obtained a decree absolute for the dissolution of her marriage on the ground of her husband's misconduct, is not entitled on the subsequent death intestate of her lifetime to dower out of the real estate of which he was seised at his death (*z*).

Judicial Separation.

The Court may pronounce a decree for judicial separation in all cases in which formerly a divorce *à mensâ et thoro* might have been obtained (*a*).

Grounds for.

Either husband or wife may obtain a decree of judicial

(*u*) 44 & 45 Vict. c. 68, s. 10.
(*x*) Divorce Amendment Act, 1868, 31 & 32 Vict. c. 77, s. 4.
(*y*) *Wells* v. *Malbon*, 10 W. R. 364.
(*z*) *Frampton* v. *Stevens*, 46 L. T. 617.
(*a*) 20 & 21 Vict. c. 85, s. 26.

separation on the ground of adultery or cruelty, or desertion for two years or upwards (*b*).

The Court is to give relief on principles and rules as nearly as possible conformable to the rules of the former Ecclesiastical Courts, the decisions of these courts consequently become authorities.

This petition is usually founded on:

1. Adultery;
2. Cruelty; or,
3. Desertion.

Adultery and cruelty have been already treated of under the heading of discretionary (*c*) defences to a suit for dissolution of marriage, there only remains therefore desertion without cause for two years and upwards.

Desertion.

Formerly this was not a ground for judicial separation. "To say that the Court is to grant a separation because the husband has thought fit to separate himself would be to confirm the desertion and gratify the deserter" (*d*). As we have seen, however, this has now been altered.

There is a material difference between desertion as a ground for judicial separation, and desertion as a discretionary defence to a petition for dissolution; in the former it must be for two years at least, in the latter no specified time is necessary.

No one can desert who does not actively and wilfully put an end to an existing state of cohabitation. But if the

(*b*) 20 & 21 Vict. c; 85 ss. 16 & 22.

(*c*) *Ante*, p. 120.

(*d*) *Evans* v. *Evans*, 1 Hag. Con. C. 120, *per* Sir William Scott.

state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or by mutual consent, desertion becomes from that moment impossible at least until their common life and home have been resumed. Either party may call on the other to resume their conjugal relations, and to enforce their resumption, but such refusal cannot constitute the offence intended by the statute under the name of desertion without cause (*e*).

A former decree of judicial separation on the ground of cruelty is sufficient proof of the cruelty on a subsequent petition for dissolution for adultery and cruelty (*f*).

And a wife who has obtained a decree of judicial separation by reason of the husband's adultery, may afterwards institute a suit to dissolve the marriage on the ground of her husband's adultery committed subsequently to the decree for judicial separation, coupled with his cruelty to her during the cohabitation (*g*).

An order may now be obtained, that on the husband being convicted of an aggravated assault the parties shall no longer cohabit, which order is to have the effect in all respects of a judicial separation. See p. 156.

Defences.

The Court will withhold from one guilty party, relief against the other guilty party (*h*). **Adultery of petitioner.**

(*e*) *Fitzgerald* v. *Fitzgerald*, 17 W. R. 265.

(*f*) *Bland* v. *Bland*, 15 W. R. 9.

(*g*) *Green* v. *Green*, 3 L. R. P. 121.

(*h*) *Forster* v. *Forster*, 1 Hag. Con. Rep. 146, *per* Sir W. Scott,

There is an important difference between this defence when offered as a defence to a suit for judicial separation and when offered as a defence to a petition for dissolution; in the former case the Court, it seems, is *bound* to dismiss the petition on such adultery being proved (*i*), in the latter, as we have seen, it is a discretionary defence (*k*).

Cruelty.

Cruelty is no bar to a suit for judicial separation by reason of adultery, even when committed with the design of getting rid of the wife (*l*), but it may be when the cruelty actually conduced to the adultery (*m*), it has been before shown to be a discretionary defence to a petition for dissolution. Cruelty, however, may be a bar when the petition is presented on the ground of desertion or on other grounds (*n*.)

The defences to suits for dissolution before mentioned (*o*) are also defences to this petition.

Estoppel,

When either party to the marriage has obtained a divorce *à mensâ et thoro* in the Ecclesiastical Courts, or the petition has been dismissed, no decree of judicial separation on the same grounds will be granted (*p*).

Again, where a wife had petitioned for judicial separa-

(*i*) *Astley* v. *Astley*, 1 Hag. 722.

(*k*) *Ante*, p. 120.

(*l*) *Harris* v. *Harris*, 2 Hag. 411.

(*m*) *Dillon* v. *Dillon*, 3 Curtis 94; *Boreham* v. *Boreham*, 14 W. R. 317.

(*n*) Browne on Div. and Mat. Causes, p. 125.

(*o*) *Ante*, p. 115.

(*p*) *Ciocci* v. *Ciocci*, 29 L. J. (P. M. & A.) 60.

tion on the ground of cruelty, but the petition was dismissed, the cruelty not being proved, it was held that she was estopped from setting up the same cruelty coupled with adultery in a subsequent petition for dissolution (*q*).

In every case of a judicial separation the wife shall from the time of such decree be considered as a *feme sole* with respect to property of every descripton which she may acquire, or which may come to or devolve upon her, and she may dispose of the same as if she were a *feme sole*; and in case she shall die intestate, the same shall go as if her husband were dead, and if she again cohabited with her husband, all such property as she may be entitled to on such cohabitation being resumed, shall be held to her separate use, subject to any agreement she may make with her husband whilst separate (*r*). Effect of decree. Wife's property her separate estate.

And this protection extends to property to which she may become entitled as executrix, administratrix, or trustee since the date of such separation, and the death of the testator or intestate shall be deemed to be the time when the wife became so entitled (*s*). Property held as executrix.

After such decree the wife is considered as a *feme sole* for the purposes of contract and wrongs, and suing and being sued, and the husband is not liable for her engagements; provided that where alimony is decreed to be paid, and the same is in arrear, the husband shall be liable for Wife *feme sole*.

(*q*) *Finney* v. *Finney*, L. R. 1 P. & D. 483.

(*r*) 20 & 21 Vict. c. 85, s. 25; and see the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75.

(*s*) 21 & 22 Vict. c. 108, s. 7.

necessaries supplied for the wife's use, and the wife may join with the husband for the purpose of exercising any joint power given to her and her husband (*t*).

Any party to the suit dissatisfied with the decision, may appeal (*ante* p. 129).

Nullity of Marriage.

The Court acts upon principles as nearly as possible the same as those which formerly influenced the Ecclesiastical Courts (*u*).

Not only is all legal presumption in favour of the validity and against the nullity of marriage, but it is so on this principle, that a legislative enactment to annul the marriage *de facto*, is a penal enactment, and therefore to be construed most strictly (*x*). It is material that the ages of the parties should be averred, and the Court has in different cases refused to proceed where the parties are at an advanced age.

Who may petition.

A father has sufficient interest to petition for his daughter's marriage to be declared void (*y*), but if he (the father) die before trial his widow cannot carry on the suit.

Requisites of legal marriage.

Certain requisites and formalities are necessary to make a marriage legal; it must be celebrated in pursuance of

(*t*) 20 & 21 Vict. c. 85, s. 26.
(*u*) Ibid. s. 22.
(*x*) *Catterall* v. *Sweetman*, 1 Robert 321.
(*y*) *Beavan* v. *McMahon and Beavan*, 8 W. R. 453.

1. Special licence, ordinary's licence, publication of banns, superintendent registrar's certificate, or superintendent registrar's licence, and must be in the presence of a person in holy orders, or of a registrar (*z*).

2. In some church or chapel or building registered for the solemnization of marriages, or before the superintendent registrar (except when solemnized by special licence).

3. Between single persons, and not within the prohibited degrees of consanguinity or affinity.

4. Being of sound mind and consenting and able to perform the duties of matrimony.

A licence is an authority for marriage, and a clergyman is bound to marry the parties under a proper licence (*a*), with the exception that no clergyman shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved (*b*).

Special licence.

A special licence is an authority to marry at *any* time, in any church, or chapel, or other convenient place. The Archbishop of Canterbury alone has the right of granting this licence (*c*).

Who may grant licences.

No person except the Archbishops of Canterbury and York and the several bishops in their dioceses, can grant licenses for the marriage of persons; one of whom shall

(*z*) Burn's Ecclesiastical Law, vol. ii. p. 433 *et seq.*

(*a*) *Agar* v. *Holdsworth*, 2 Lee, 515.

(*b*) 20 & 21 Vict. c. 85, s. 57.

(*c*) 25 Hen. 8, c. 21; *semble*, the Bishop of Sodor and Man has the right of granting special licences in his diocese: *Piers* v. *Piers*, 2 H. L. Cas. 331.

be resident at the time within the diocese of the bishop in whose name the same shall be granted (*d*).

Residence in parish.

No licence is granted unless one of the parties swear that in his or her behalf there is no impediment to the marriage, and that one of the parties has resided in the parish for fifteen days prior thereto, and if one of the parties be a minor, not being a widow or widower, that the necessary consent of the parent has been obtained, or that no person whose consent is necessary is then living (*e*).

The marriage must be solemnized within three months, or a new licence must be obtained (*f*).

Marriages without licence or by banns void.

The marriages of persons who knowingly and wilfully intermarry without due publication of banns, or licence, are null and void to all intents and purposes whatsoever (*g*), but *both* parties must knowingly and wilfully consent (*h*).

Superintendent registrar's certificate.

By the 6 & 7 Will. 4, c, 85, s. 1. it is enacted that where by any law or canon prior thereto, any marriage might be solemnized after publication of banns, such marriage may be solemnized on production of the registrar's certificate; before such certificate is granted, notice must be given to the registrar of the district within which the parties have for seven days next preceding resided, and shall state therein the names,

(*d*) 3 Geo. 4, c. 75, s. 14.
(*e*) 4 Geo. 4, c. 76, s. 14.
(*f*) Ibid. s. 19.
(*g*) Ibid. s. 22.
(*h*) *R.* v. *Wroxton*, 4 B. & Ad. 640.

condition, place of residence of the parties, and the church or building in which the marriage is proposed to be solemnized (*i*). After the expiration of seven days, if the marriage is to be solemnized by licence, or of twenty-one days, if without licence, from the entry of such notice, such certificate will be issued by the registrar (*k*), and such certificate shall stand in the place of banns for all purposes.

Superintendent registrar's licence.

A superintendent registrar has power also to grant licences for marriage in any registered building or in his office (*l*), but only on production of the certificate to be obtained as above stated (*m*).

Before whom.

Except when licensed by a registrar the marriage must be solemnized before a person in holy orders, and the marriages of any persons who shall knowingly and wilfully consent to the solemnization thereof before any person not in holy orders, are absolutely null and void (*n*). But when licensed by the superintendent registrar marriages may be solemnized in a registered building, or in his office before him and a registrar of the district and two witnesses (*o*).

Time.

Marriages except by special licence must be between the hours of eight and twelve in the forenoon.

The parties.

The parties must be single, and therefore where one of

(*i*) 6 & 7 Will. 4, c. 85, s. 4.
(*k*) Ibid. s. 7.
(*l*) Ibid. s. 11.
(*m*) Ibid. s. 12.
(*n*) 4 Geo. 4, c. 76, s. 22.
(*o*) 6 & 7 Will. 4, c. 85, ss. 20, 21.

the parties had obtained a decree *nisi* for dissolution of a former marriage and remarried before the decree absolute, the second marriage was held void (*p*).

Consanguinity.

All marriages between persons within the prohibited degrees of consanguinity and affinity are absolutely void (*q*).

The prohibited degrees are set out in the Book of Common Prayer, and include illegitimate relations (*r*).

Consenting.

Consent is another requisite to a legal marriage, a marriage solemnized when one of the parties is *non compos mentis* is not binding (*s*).

Age.

Males under the age of fourteen, and females under the age of twelve, are incapable of giving consent (*t*), but at those ages the marriages are voidable not void (*u*).

The absence of any of the above requisites to a legal marriage will form grounds for a decree of nullity, and in addition to these incapacity of body may be mentioned.

Incapacity of body must be permanent.

The incapacity complained of must be permanent and incurable, if there be any chance of cure, however improbable, the decree will not be made (*x*).

But the impotent party cannot institute the suit, for a man is not allowed to plead his own natural impotency

(*p*) *Chichester* v. *Murl*, 32 L. J. (P. M. & A.) 147.
(*q*) 5 & 6 Will 4, c. 54, s. 1.
(*r*) *Homer* v. *Homer*, 1 Hag. Con. C. 352.
(*s*) *Turner* v. *Turner*, Ibid. p. 414.
(*t*) Pritchard on Divorce, 3.
(*u*) *Arnold* v. *Earle*, 2 Lee, 529.
(*x*) *S., falsely called E.* v. *E.*, 3 Sw. & Tr. 240; *Stagg* v. *Edgecombe*, 12 W. R. 19.

as a ground for a sentence of nullity of marriage (*y*). Nor can the suit be instituted by any one except the party who suffers the injury (*z*).

An agreement to put an end to a suit for nullity of marriage, on the ground of the impotency of the respondent is not void as being against public policy (*a*).

The death of one of the parties will preclude the other from impeaching the validity of the marriage on the ground of impotency (*b*).

Defences.

When the ground of the petition is the absence of one of the requisites to a legal marriage, No. 3 and 4 (*ante*, p. 137), it is difficult to see what defence can be pleaded except an absolute denial. As to suits for nullity for want of those formal requisites numbered 1 and 2, matters in confession and avoidance may be pleaded (*c*).

Delay not absolute bar.

Delay in instituting proceedings is not an absolute bar to the suit, but the evidence in support of the petition must be of the clearest and most satisfactory kind (*d*).

A charge of cruelty with a prayer for judicial separation forms no answer to a suit of nullity (*e*).

(*y*) *Norton* v. *Seton*, 3 Phill. 147.
(*z*) *A.* v. *B.*, L. R. 1 P. & D. 559.
(*a*) *Wilson* v. *Wilson*, 14 Sim. 405.
(*b*) *A.* v. *B.*, L. R. 1 P. & D. 559.
(*c*) Browne on Div. and Mat. Causes, pp. 129, 131.
(*d*) *Castleton* v. *Castleton*, 9 H. L. Cases, 186.
(*e*) *Humphrey* v. *Williams*, 29 L. J. (P. M. & A.) 62.

When the suit was not brought for twenty-seven years after the marriage it was held that the petitioner was barred by her delay (*f*).

As already stated, either party dissatisfied with the decision of the Court in a suit for nullity may appeal to the House of Lords (*ante*, p 129).

Jactitation of Marriage.

Jactitation of marriage.

Jactitation of marriage occurs where one party "boasts or gives out that he or she is married to the other, whereby a common reputation of their marriage may ensue" (*g*).

Object of suit.

The object of the suit is to enforce perpetual silence on the jactitator, or person boasting of the marriage. As a general rule this suit can only be brought by one of the parties to the pretended marriage (*h*), but in one case the father of a minor, as his natural guardian, was permitted to institute such a suit against a woman boasting to be the minor's wife (*i*).

These suits are not of such frequent occurence now as formerly, when the facilities offered for marriage at Gretna Green gave a greater probability to the boasting allegation.

(*f*) *Reynolds, otherwise Wilkins* v. *Reynolds*, 45 L. J. D. Div. 89.
(*g*) Black. Com. vol. iii. p. 93.
(*h*) *Campbell* v. *Corley*, 31 L. J. (Mat. Cas.) 60.
(*i*) *Butler* v. *Dolben*, 2 Lee, 312.

Defences.

There can only be three defences to this petition:

1. A positive denial of the boasting of the marriage.
2. Proof that such marriage actually did take place.
3. Acquiescence, *i.e.*, that the petitioner permitted the assumption of the character of husband or wife (*k*).

Restitution of Conjugal Rights.

Restitution of conjugal rights.

The Court proceeds upon principles and rules as nearly as may be conformable to the principles and rules which formerly guided the Ecclesiastical Courts, subject, however, to the rules and orders made under the Act (*l*).

Ground for.

The one ground for this petition is that one of the parties to the marriage has without reasonable excuse withdrawn from cohabitation; if such a case be proved the Court will make a decree compelling cohabitation (*m*).

Formal proof of the marriage must be given even if undenied in the answer.

Court will not inquire into motives.

Unless the respondent can shew a legal defence, the petitioner will be entitled to a decree, the Court cannot inquire into the sincerity of the petitioner in bringing the suit (*n*).

(*k*) *Bodkin* v. *Case*, Milward's Ir. Ecc. Cas. 356.
(*l*) 20 & 21 Vict. c. 85, s. 22.
(*m*) *Barlee* v. *Barlee*, 1 Add. 305.
(*n*) *Scott* v. *Scott*, 12 L. T. (N. S.) 211.

Adultery of petitioner.

When one of the parties to a suit for restitution of conjugal rights had been guilty of adultery, he or she cannot successfully sustain a petition (*o*).

Semble that where both parties have been guilty of adultery the Court will make the decree (*p*). An agreement even under seal to live separate is no bar to a suit for restitution (*q*).

On a petition for restitution of conjugal rights being presented, an affidavit must be filed verifying the facts, of which the petitioner has personal knowledge, and deposing as to belief in the truth of the other facts alleged in the petition and in addition.

The affidavit filed must shew clearly that a written demand to return to cohabitation has been served on the party to be cited (*r*).

Defences.

The facts relied on as a defence must be such as would entitle the parties to a decree of judicial separation in an original suit (*s*).

When the petitioner is proved to have been guilty of adultery, and the respondent claims it, a decree of judicial separation may be made (*t*).

(*o*) *Hope* v. *Hope*, 31 L. T. 138.
(*p*) *Seaver* v. *Seaver*, 2 S. & T. 665, App. 11.
(*q*) *Spering* v. *Spering*, 9 L. T. (N.S.) 24.
(*r*) Rules 2, 175.
(*s*) *Holmes* v. *Holmes*, 2 Lee, 116; *Barlee* v. *Barlee*, 1 Add. 305.
(*t*) *Blackborne* v. *Blackborne*, 18 L. T. (N.S.) 450.

Cruelty may be relied on as a defence to a suit for restitution, and if proved will entitle the party tendering such defence to a decree for separation (*u*). Cruelty.

Impotency of the petitioner is a good defence, and a decree of nullity may be made (*x*).

Where a wife has entered into a separation deed, covenanting not to sue for restitution of conjugal rights, she is bound by that covenant, and any suit brought in violation thereof will be dismissed (*y*).

At any time after the commencement of the suit the respondent may obtain an order to stay the proceedings by reason that he or she is willing to return to cohabitation (*z*). Stay of proceedings

The decree must contain an order that it be obeyed within a specified time, and if it do not, the Court will not grant an attachment for contempt until such order has been served (*a*). The decree.

Alimony.

The Court may, on a decree for dissolution of marriage, order that the husband secure to the wife such gross sum of money, or such annual sum for any term not exceeding her own life, as having regard to her fortune, to the ability of the husband, and to the conduct of the parties, Gross sum. Annual sum.

(*u*) *Dysart* v. *Dysart*, 1 Robert. 109.
(*x*) *Ricketts* v. *Ricketts*, 35 L. J. (P. M. &. A.) 92.
(*y*) *Marshall* v. *Marshall*, 5 P. D. 19.
(*z*) Rule 176.
(*a*) *Cherry* v. *Cherry*, 29 L. J. (Mat. Cas.) 141.

shall seem reasonable, and upon any such petition, make interim orders for payment of money by way of alimony or otherwise to the wife (*b*). By the 29 & 30 Vict. c. 32, after reciting that it sometimes happens that a decree for dissolution is obtained against a husband who has no property on which the payment of such gross or annual sum can be secured, it is enacted (sect. 1) that in every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance as the Court may think reasonable.

The Court derives its power to grant alimony in all other suits from sect. 6 of the 20 & 21 Vict. c. 85, which transfers all jurisdiction then vested in the Ecclesiastical Courts in such suits to the Court for Divorce and Matrimonial Causes.

Alimony, *pendente lite*, wife petitioner.

The wife, being the petitioner, may file her petition for alimony at any time after the citation has been duly served, or such service has been dispensed with, provided the *factum* of marriage between the parties has been proved by affidavit previously filed (*c*).

But when she is the respondent she must enter an appearance first (*d*).

After the husband has filed his answer to the petition for alimony, or if no answer be filed, at the expiration of the time allowed for filing an answer, the wife may

(*b*) 20 & 21 Vict. c. 85, s. 32.
(*c*) Rule 81.
(*d*) Rule 82.

examine witnesses in support of her petition, and apply *by motion* for an allotment of alimony pending suit, notice thereof being given to the husband or his solicitor four days previously to the motion being heard (*e*). Application by motion.

All applications for an allotment of alimony pending suit are now referred to one of the registrars to make the necessary inquiries (*f*).

All questions of alimony should be disposed of as soon as possible after the commencement of the suit, that the husband may not be needlessly harassed by claims for the debts of the wife (*g*).

The wife although charged with adultery by the husband's petition, which she has not denied, is still entitled to alimony (*h*).

And she is entitled even when convicted of felony and undergoing imprisonment (*i*). Also when the validity of the marriage itself is in question, as in suits for nullity (*k*), but not when the marriage is clearly void on the face of the petition and answer (*l*). But when the husband is an uncertificated bankrupt no order will be made against him (*m*), nor when he can prove that he has no means (*n*). No alimony when the husband is a bankrupt.

(*e*) Rule 89.
(*f*) Rule 191.
(*g*) *Brisco* v. *Brisco*, 2 Hag. Con. C. 199.
(*h*) *Smith* v. *Smith and Tremsaux*, 4 Sw. & Tr. 228.
(*i*) *Kelly* v. *Kelly*, 11 W. R. 958.
(*k*) *Bird* v. *Bell*, 1 Lee, 209.
(*l*) *Blackmore* v. *Mills*, 16 W. R. 893.
(*m*) *Bruere* v. *Bruere*, 1 Curt. 566.
(*n*) *Gaynor* v. *Gaynor*, 31 L. J. (P. & M.) 144.

Amount. The amount of alimony *pendente lite* which will be granted will vary according to circumstances, but as a general rule one-fifth of the joint income of husband and wife will be allotted.

Deductions. In calculating the income of the husband, deductions may be made for payments which are usual and necessary, thus the outlay in repairs made of necessity each year (*o*), and payments on account of debts of the wife (*p*), and payments made in satisfaction of a debt contracted to be paid by yearly instalments (*q*) may all be deducted. But not the annual premiums payable on an insurance on his own life (*r*).

Ceases. In suits for dissolution for the wife's adultery, on the adultery being proved, alimony *pendente lite* ceases; where the cause is heard before the Court it therefore ceases on the decree *nisi* when tried before a jury, when the time for moving for a new trial has elapsed without such application being made (*s*), or for appealing from a refusal of a rule for a new trial.

Where the wife is petitioner in suits for dissolution of marriage alimony is payable until the decree has been made absolute.

In all other suits it continues to be payable until the termination of the suit.

The wife is entitled to alimony pending an appeal

(*o*) *Hayward* v. *Hayward*, 28 L. J. (P. & M.) 9.
(*p*) *Hamerton* v. *Hamerton*, 1 Hag. 27.
(*q*) *Patterson* v. *Patterson*, 33 L. J. (P. & M.) 36.
(*r*) *Madan* v. *Madan and De Thoren*, 17 W. R. 265.
(*s*) *Wells* v. *Wells and Hudson*, 3 Sw. & Tr. 542.

unless in the opinion of the Court such appeal is vexatious (*t*).

Permanent alimony.

The principles upon which the Court is guided upon decreeing permanent alimony are, that the wife, having been deprived of her position by her husband's misconduct, ought not to purchase redress at the cost of being left without means; nor must she have any great pecuniary interest in obtaining a dissolution, and that such maintenance is to be paid only so long as she remains chaste and unmarried (*u*).

Where by the terms of a deed of separation a wife had agreed to accept certain sums for her support, and had covenanted not to sue her husband at any future time for any further maintenance, but having subsequently discovered that he had been guilty of incestuous adultery, she had obtained a decree *nisi* for dissolution of the marriage, it was held that, notwithstanding the restraint in the deed, she was entitled to the usual order for permanent maintenance (*x*).

It will be noticed that the decree made in this case was for dissolution; had it been for judicial separation only it is now decided that the deed would have been binding, and could not have been altered by the Court (*y*).

And, further, a married woman can contract to live separately from her husband, and he may apply to the

(*t*) *Jones* v. *Jones*, L. R. 2 P. & D. 332.
(*u*) *Fisher* v. *Fisher*, 10 W. R. 122.
(*x*) *Morrall* v. *Morrall*, 47 L. T. 50.
(*y*) *Gandy* v. *Gandy*, 7 P. D. 168.

Court (Chancery Division) for an order to restrain the wife from proceeding in the Divorce Court (*z*).

We have already seen that where the husband has no property on which such gross or annual sum of money can be charged the Court may order the payment of such monthly or weekly sum as shall seem just (*a*).

After judicial separation.

A wife who has obtained a final decree of judicial separation in her favour *and has previously thereto* filed her petition for alimony pending suit, or, though no alimony has been allotted to her pending suit, on such decree being affirmed on appeal, or after the expiration of the time limited for appeal against the decree, if no appeal be then pending, may apply by motion for an allotment of permanent alimony, provided she shall give eight days' notice thereof before making such application to the husband or his solicitor (*b*).

Amount.

The amount which will be granted for permanent alimony varies according to the position of the parties and the abilities of the husband; no exact proportion has been fixed, but usually from one-third to one-half of the joint incomes of husband and wife will be allotted; but the Court has no power to allot more than one-half, though the wife may have brought more than one-half of the property into settlement (*c*).

How calculated.

In the absence of proof that the husband's income

(*z*) *Besant* v. *Wood*, 12 Ch. Div. 605.
(*a*) *Ante*, p. 146.
(*b*) Rules 91 & 190.
(*c*) *Haigh* v. *Haigh*, 20 L. T. (N. S.) 281.

has altered, the basis of calculation will be the amount of income on which alimony *pendente lite* was allotted, and neither party may dispute the correctness of the estimate (*d*).

When the husband obtains a decree of judicial separation on the ground of the wife's cruelty he must make a provision for her maintenance (*e*), but he will not be required to give a bond with sureties to secure its payment (*f*).

Permanent alimony shall, unless otherwise ordered, commence and be computed from the date of the final decree of the judge or of the full Court on appeal, as the case may be (*g*). When computed from.

The deductions allowed to be made in computing income for alimony *pendente lite* apply also to permanent maintenance.

A wife may at any time after permanent alimony has been allotted to her, file a petition for an increase of the amount, on account of increase in her husband's income, or the husband may file a petition for a diminution of such alimony by reason of reduced faculties (*h*). Increase.

The husband must within eight days of the filing and delivery of the petition file his answer thereto upon oath (*i*), if such answer be not so filed, the husband Answer.

(*d*) *Franks* v. *Franks*, 31 L. J. (Mat. Cas.) 25.
(*e*) *Pritchard* v. *Pritchard*, 3 Sw. & T. 523.
(*f*) *Forth* v. *Forth*, 15 W. R. 1091.
(*g*) Rule 93.
(*h*) Rule 92.
(*i*) Rule 84.

cannot cross-examine or contradict the witnesses supporting the petition (*k*).

Injunction to protect property.

When an absolute decree for dissolution of marriage has been pronounced and an order for permanent alimony made, and the property out of which it is payable is being squandered, a Court of Equity will grant an injunction and appoint a receiver to preserve the property for the benefit of the former wife (*l*).

Alimony is allotted for the maintenance of the wife from year to year; the Court therefore will not without good cause shewn for the delay, enforce arrears beyond one year (*m*).

Settlements.

On innocent party and children.

"In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property, either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall deem reasonable to be made of such property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them" (*n*).

It was held under this section that the Court had no power to alter the terms of a marriage settlement (*o*).

(*k*) *Constable* v. *Constable*, L. R. 2 P. & D. 17.
(*l*) *Sidney* v. *Sidney*, 17 L. T. 9.
(*m*) *Wilson* v. *Wilson*, 3 Hag. 329 (notes).
(*n*) 20 & 21 Vict. c. 85, s. 45.
(*o*) *Norris* v. *Norris and Gyles*, 27 L. J. (P. & M.) 72.

However, another Act has now been passed which gives power to the Court after a *final decree of nullity of marriage, or dissolution of marriage,* to inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the Court may seem fit (*p*).

Court has power to vary marriage settlement.

In exercising the power so given to it the Court will take into consideration the conduct of the parties, the amount of the wife's property, and the ability of the husband (*q*), and will act in such a manner as, if possible, to prevent the innocent party from being injured in a pecuniary sense (*r*).

It was held under this Act, that where there were no issue born of the marriage, the Court had no power to alter the terms of the settlement (*s*), nor where the children are not living at the time of the decree (*t*).

But this is not so now, for by the 3rd section of the Matrimonial Causes Act, 1878 (41 Vict. c. 19), it is enacted that "the Court may exercise the powers vested in it by the provisions" of the last-mentioned Act, "notwithstanding there are no children of the marriage."

(*p*) 22 & 23 Vict. c. 61, s. 5.

(*q*) *March* v. *March*, 36 L. J. (P. & M.) 65.

(*r*) *Maudslay* v. *Maudslay*, L. R. 2 P. Div. 256.

(*s*) *Sykes* v. *Sykes and Smith*, L. R. 2 P. & D. 163; *Dempster* v. *Dempster*, 31 L. J. (P. & M.) 113.

(*t*) *Corrance* v. *Corrance and Lower*, 16 W. R. 893.

But it seems the Act is not retrospective, therefore where the decree absolute was pronounced before the Act came into force it did not apply (*u*).

The power of the Court to make orders with reference to the application of settled property after the dissolution of a marriage is a discretionary power of the most absolute and unfettered kind; but to be exercised judicially with reference to all the circumstances of the case. The Court has the power, and it is the duty of the Court, to take into consideration the guilt of either party, and may, if it thinks fit, exclude the guilty party wholly or partially from the benefit of any provision; the discretion of the judge of the Divorce Court judicially exercised will not, except in cases of gross miscarriage or manifest error, be interfered with by the Court of Appeal, though the order may not be in all respects such as the Court of Appeal itself would have made (*x*).

But the Court has no power to alter or deal with settlements when the proceedings taken are for judicial separation only (*y*), and therefore where the husband in a separation deed covenanted to allow the wife £100 per annum, and she subsequently obtained a decree of judicial separation against him, with alimony at the rate of £180 per annum, it was held that the decree for alimony did not affect the deed, and that if the

(*u*) *Yglesias* v. *Yglesias*, L. R. 4 P. Div. 71; *Ansdell* v. *Ansdell, Sleddall and Crockett*, L. R. 5 P. Div. 138.

(*x*) *Wigney* v. *Wigney*. 46 L. T. 441.

(*y*) See *Gandy* v. *Gandy*, 7 P. D. 168.

£100 were duly paid the husband was not liable for the wife's debts (*z*).

We have already seen that either party may specifically enforce the provisions of a separation deed (*b*).

A petition for variation of settlement must usually be signed by the petitioner, but under special circumstances the Court will allow his solicitor to sign on his behalf (*c*).

Protection to Wife's Earnings.

Wife may apply to magistrate to protect property.

A wife deserted by her husband may at any time after such desertion, if resident within the Metropolitan district, apply to a police magistrate, or if resident in the country, to justices in petty sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property she may become possessed of after such desertion, against her husband or his creditors; and the Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make such order, and such earnings and property shall belong to the wife as if she were a *feme sole;* every such order must within ten days of the making thereof be entered with the registrar of the County Court within whose jurisdiction the wife is resident, and the husband or any creditor or

(*z*) *Negus* v. *Forster*, 46 L. T. 674.
(*b*) *Ante* p. 150, *Besant* v. *Wood*, 12 Chan. Div. 605.
(*c*) *Ross* v. *Ross*, 7 P. D. 20.

person claiming under him may apply to discharge the same, and if the husband or other person claiming under him, shall seize or continue to hold such property after notice of any such order, he shall be liable at the suit of the wife to restore the specific property, and also for a sum equal to double its value (*d*).

The provisions mentioned above have now been extended to property to which the wife has become or shall become entitled as executrix, administratrix, or trustee, since the commencement of the separation. And the death of the testator or intestate shall be deemed to be the time when such wife became so entitled (*e*).

Desertion, what is.

The desertion must be continuous. A *bonâ fide* offer by the husband to provide for the wife, deprives her of her right to the order (*f*).

The absence of the husband as a mariner does not constitute desertion, nor will the Court take into consideration actual desertion in former years when the parties have returned to cohabitation (*g*).

And now, by the Matrimonial Causes Act, 1878, it is enacted that if the husband shall be convicted of an aggravated assault on the wife, the Court or magistrate before whom he shall be convicted may, if satisfied that the future safety of the wife is in peril, order that the

Order that parties live separate.

(*d*) 20 & 21 Vict. c. 85, s. 21.

(*e*) 21 & 22 Vict. c. 108, s. 7; and see the Married Women's Property Act, 1882.

(*f*) *Cargill* v. *Cargill*, 4 Jur. (N. S.) 764.

(*g*) *Aldridge, Ex parte*, 1 Sw. & T. 88.

wife shall be no longer bound to cohabit with her husband, and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty, and such order may further provide that the husband pay such weekly sum as may seem to be in accordance with his means, and with any means the wife may have for her support, and the Court or magistrate shall have power from time to time to vary the same upon the application of either party that the means of the husband or wife have altered in amount since the original order or any subsequent order varying it shall have been made; and further, that the legal custody of any children of the marriage under the age of ten years shall in the discretion of the Court be given to the wife, but no order for payment of money by the husband or for custody of the children of the marriage shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned, and any such order may be discharged on proof that since the making thereof the wife has been guilty of adultery (*h*).

Same effect as judicial separation.

An appeal lies from any orders under this section to the Probate and Divorce Division.

And now wherever the provisions of the Married Women's Property Act, 1882, apply the protection before mentioned will be afforded to married women without reference to the Statutes referred to.

(*h*) Sect. 4.

Custody of Children.

Court has power as to custody of children.

In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance and education of the children of the parents whose marriage is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery (*i*). At the hearing of a suit the Court will not order that the custody of the children be given to the petitioner unless it has been claimed in the petition (*k*). Under the Matrimonial Causes Act, 1878, the Court has power to give the custody of children under ten years of age to the mother. See page 157.

The Court may order that one party shall have access merely to the children *pendente lite* (*l*).

Application on behalf of a husband or wife, parties to a cause for access to the children of their marriage, may be made by summons before one of the registrars, who shall direct such order to issue as he thinks fit, subject to appeal to the Court by either party dissatisfied with the order (*m*).

(*i*) 20 & 21 Vict. c. 85, s. 35.
(*k*) *Cartledge* v. *Cartledge*, 31 L. J. (P. & M.) 85.
(*l*) *Thompson* v. *Thompson*, 31 L. J. (P. & M.) 213.
(*m*) Rule 212.

The Court, *after* a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may, upon application by petition for this purpose, make *from time to time* all such orders and provision with respect to the custody, maintenance, and education of the children of the marriage, or of placing such children under the protection of the Court of Chancery, as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending (*n*).

In suit for restitution of conjugal rights no power to make order.

But in a suit for restitution of conjugal rights, the Court has no power under sect. 35 of the 20 and 21 Vict. c. 85, to make any order as to the custody of the children (*o*).

Nor where a petition for dissolution of marriage is dismissed has the Court any power to make any order as to the custody of or access to the children of the marriage (*p*).

Age, up to sixteen years.

The Court has jurisdiction in its order to regulate the custody of children up to the age of sixteen, but not over (*q*).

Interveners.

Under sect. 35 of the 20 and 21 Vict. c. 85, and sect. 4 of the 22 and 23 Vict. c. 61, persons who are not parties to the suit may intervene upon the question of

(*n*) 22 & 23 Vict. c. 61, s. 4.

(*o*) *Chambers* v. *Chambers*, 39 L. J. (P. & M.) 56.

(*p*) *Seddon* v. *Seddon*, 7 L. T. (N.S.) 253.

(*q*) *Mallinson* v. *Mallinson*, 14 W. R. 973; *Ryder* v. *Ryder*, 3 L. T. (N.S.) 678.

custody and maintenance of the children of parents whose marriage is the subject of the suit (*r*).

But where persons not parties to the suit intervene in an application for custody of the children, they may have to pay the costs if their intervention be unsuccessful (*s*). And the costs of an unsuccessful motion by the wife for access to the children will not be allowed (*t*).

When the wife succeeds in her suit she is generally entitled to the custody of the children (*u*), but the matter rests entirely in the discretion of the judge, and the interests of the child are primarily to be considered by him (*x*).

But although the wife may have obtained a decree of judicial separation, the Court will not give her the custody of the children if she intends to bring them up in a religion different from that of their father (*y*).

Damages against the Adulterer.

Any husband may either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery

(*r*) *Chetwynd* v. *Chetwynd*, 34 L. J. (P. & M.) 130.

(*s*) *March* v. *March and Palumbo*, L. R. 1 P. & D. 437.

(*t*) *Hepworth* v. *Hepworth*, 30 L. J. (Mat. Cas.) 253.

(*u*) *Boynton* v. *Boynton*, 9 W. R. 620.

(*x*) *Taylor, In re*, 25 W. R. 69, and see provisions of Mat. Causes Act, 1878, *ante*, p. 157.

(*y*) *D'Alton* v. *D'Alton*, L. R. 4 P. Div. 87.

with the wife of such petitioner; and, after the verdict has been given, the Court shall have the power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be applied for the benefit of the children (if any) of the marriage, or as a provision for the wife (*z*). Application.

The measure of damages is the value of the wife of whom the husband has been deprived; the means of the co-respondent cannot as a general rule be taken into consideration, but perhaps they may when he has used his wealth as a means of seducing the wife (*a*). Measure of damages.

If the co-respondent do not appear the jury are bound to assess damages against him, even if their verdict be in favour of the respondent (*b*).

The Court has no power to order immediate execution for recovery of damages against a co-respondent and ordered to be paid to the petitioner, nor that the co-respondent pay them into Court (*c*). Enforcing payment.

Defences of co-Respondents.

Any defence that could have been formerly set up as a defence to an action of crim. con., whether in bar, or in mitigation of damages, can now be adduced by a co-respondent. He may show that the marriage is void for

(*z*) 20 & 21 Vict. c. 85, s. 33.
(*a*) *Cowing* v. *Cowing and Wollen*, 33 L. J. (Mat. Cas.) 149.
(*b*) *Stone* v. *Stone and Appleton*, 13 W. R. 414.
(*c*) *Pounsford* v. *Pounsford and Bulpin*, 5 L. T. (N.S.) 139.

any of the reasons set forth in grounds for Nullity of Marriage, p. 141.

Connivance of petitioner.

And on its being proved that the petitioner has been guilty of connivance the Court is bound to dismiss the petition for damages against the co-respondent (*d*).

And the co-respondent may also shew, in mitigation, that he did not know the woman was married.

Application.

The Court has an absolute discretion in directing in what way the damages are to be applied, and will be guided by the facts of each particular case, generally in payment first of the petitioner's costs out of pocket which cannot be taxed against the co-respondent, and next that the amount shall be settled upon the petitioner, the respondent, or the issue of the marriage.

Reversal of Decree of Judicial Separation.

Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may at any time hereafter present a petition to the Court praying for a reversal of such decree, on the ground that it was obtained in his or her absence, and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree, and the Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly; but such reversal is not to affect any rights or remedies which any other person would

(*d*) *Ellyatt* v. *Ellyatt*, 33 L. J. (Mat. Cas.) 137.

have had in case such reversal had not been decreed in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof (*e*).

Payments, &c., protected.

All persons and corporations who in reliance on any such order or decree, shall have made any payment to, or permitted any transfer or act to have been made or done by, the wife, are protected, notwithstanding such order may have been then discharged, reversed, or varied, or such separation may have then ceased, provided they had no notice thereof (*f*).

Grounds for, must be set out.

A petition to the Court for a reversal of a decree of judicial separation must set out the grounds on which the petitioner relies (*g*).

The absence necessary as a ground for a petition for reversal is not an absence without notice or knowledge of the suit, but merely a non-appearance therein, and it will not be sufficient in such a petition to allege the non-appearance of the petitioner, but there must, in addition, be set out the cause of such absence, and also circumstances to shew that the decree was wrong on the merits (*h*).

Evidence.

Orally in open Court.

Subject to any rules to be made, the witnesses in all proceedings before the Court, where there attendance can

(*e*) 20 & 21 Vict. c. 85, s. 23, and see 21 & 22 Vict. c. 108, s. 8.
(*f*) 21 & 22 Vict. c. 108, s. 10.
(*g*) Rule 63.
(*h*) *Phillips* v. *Phillips*, 14 W. R. 902.

be had, shall be sworn and examined orally in open Court; but each party may prove any part or the whole of his or her case by affidavit, subject, however, to a right of cross-examination by or on behalf of the opposite party, orally in open Court (*i*).

The cases are, however, very few in which the parties have been allowed to verify their cases by affidavit.

Attendance of witnesses.

The Court may issue writs of *subpœna* or *subpœna duces tecum* to be served in any part of Great Britain or Ireland, and the same shall have the like effect and force as subpœnas issued by any of the Superior Courts of Common Law (*k*).

Confrontation.

The Court has power in any suit but for dissolution of marriage, to order that either of the parties to the marriage shall attend, and be confronted with the witnesses, for the purpose of identification (*l*).

Copy of certificate.

Whenever any book or other document is of such a public nature as to be admissible in evidence on mere production from the proper authority, any copy thereof or extract therefrom shall be admissible, provided it be proved to be an examined copy or extract, or purports to be signed and certified as a true copy or extract by the officer to whose custody the same is intrusted (*m*).

Parties admissible witnesses.

The parties to any suit instituted in consequence of adultery, and their husbands and wives, are competent to

(*i*) 20 & 21 Vict. c. 85, s. 46.
(*k*) 20 & 21 Vict. c. 85, s. 49.
(*l*) *Searle* v. *Price*, 2 Hag. Con. C. 192.
(*m*) 14 & 15 Vict. c. 99, s. 14.

give evidence, but no person in any proceeding, whether a party or not, shall be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery, unless such witness shall have first given evidence in the same proceeding in disproof of the alleged adultery (*n*).

(*n*) 32 & 33 Vict. c. 68, s. 3.

PRACTICE.

PRACTICE.

PROCEEDINGS before the Divorce Court are commenced by filing a petition (*a*). **Petition.**

When the husband presents a petition for dissolution of marriage, he may, as we have seen, add a claim for damages against the co-respondent, but only in the petition (*b*). **Damages.**

Every petition shall be accompanied by an affidavit made by the petitioner, verifying the facts, and such affidavit shall be filed with the petition (*c*). **Affidavit in support.**

But where the petitioner *was abroad* on military service, and unable to make the usual affidavit, the Court allowed the petition to be filed, if verified by the affidavit of his solicitor, but ordered that the petitioner's affidavit should also be filed as soon as possible (*d*).

In cases where the petitioner is seeking a decree of nullity of marriage, or of judicial separation, or of dissolution of **Collusion.**

(*a*) Rule 1, 1866.
(*b*) 20 & 21 Vict. c. 85, s. 33.
(*c*) Rule 2.
(*d*) *Bruce* v. *Bruce and Laing*, 6 P. D. 16.

marriage, or a decree of jactitation of marriage, the petitioner's affidavit shall further state that no collusion or connivance exists between the petitioner and the other party to the marriage (*e*). An affidavit filed in verification of a petition should not go into a detailed history of the parties, for extra costs occasioned thereby may be taxed against the party using such affidavit (*f*).

Affidavit in support not evidence.

The affidavit filed in support will not be evidence at the hearing, but the petition must be proved independently of such affidavit (*g*).

The facts relied on should be set out in the petition, as the Court will not go into evidence of facts outside the petition, but this does not apply to facts which only constitute evidence in support, as the petitioner is only to shew the cause of action, not the evidence on which he supports it (*h*).

And the acts complained of must be set out in express and distinct terms, and when possible the dates given. If the information given be not sufficiently explicit, an application for further and better particulars may be made by summons (not by motion) to one of the registrars (*i*).

Further particulars.

Co-respondents.

Upon a husband filing a petition for dissolution of marriage on the ground of adultery, the alleged adulterers

(*e*) Rule 3.
(*f*) *Forster* v. *Forster*, 1 S. & T. 163.
(*g*) *Deane* v. *Deane*, 4 Jur. (N.S.) 268.
(*h*) *Allen* v. *Allen*, 30 L. J. (P. & M.) 2.
(*i*) Rules 38, 181.

shall be made co-respondents in the cause unless the judge otherwise directs (*k*).

When adultery is charged in the petition, but the adulterer is not known, leave from the Court must be obtained to proceed without making a co-respondent (*l*), and this leave must be obtained even when the co-respondent is dead (*m*). Application for such direction is made to the judge on motion supported by affidavit (*n*).

Every petitioner who files a petition and affidavit shall forthwith extract a citation, under seal, for service on each respondent in the cause (*o*), which term includes co-respondents when applicable. Citation.

Every citation must be written or printed on parchment, and must be signed and sealed with the seal of the Court.

A citation answers the same purpose as a writ of summons at Common Law; it is in form an announcement that a petition has been filed against the party to be served, and requiring him or her to appear thereto within eight days. Form.

Citations are to be served personally when possible, to be effected in the same manner as service of writs at Common Law; a certified copy of the petition under seal must be handed to each person served with the citation. Where personal service cannot be effected, applications Service.

(*k*) Rule 4.
(*l*) *Pitt* v. *Pitt*, L. R. 1 P. & D. 464.
(*m*) *Tollemache* v. *Tollemache*, 28 L. J. (P. & M.) 2.
(*n*) Rule 5.
(*o*) Rule 8.

may be made by motion to the judge or the registrars in his absence, to substitute some other mode of service (*p*).

Substituted service.

To entitle a petitioner to proceed without personal service it is not sufficient to shew that the respondent is abroad, and that the petitioner does not know his whereabouts, some attempts must have been made to discover and serve him (*q*).

By advertisement.

When personal service cannot be effected, the Court will order substituted service, frequently by advertisement in the daily papers, and in this case the newspapers in which such advertisements are inserted are to be filed in the registry with the citation (*r*).

Certificate of service.

After service has been effected, the citation, with a certificate of service indorsed thereon, shall be forthwith returned into and filed in the registry (*s*).

Appearance.

All appearances are to be entered in the registry in a book provided for that purpose.

Time.

An appearance may be entered at any time before a proceeding has been taken in default, or afterwards by leave of a registrar, to be obtained by summons.

Under protest.

If a party cited wish to raise any question as to the jurisdiction of the Court, he or she must enter an appearance under protest, and within eight days file in the registry, his or her act on petition in extension of such protest, and on the same day deliver a copy thereof to the

(*p*) Rules 11, 12, 13.
(*q*) *Sudlow* v. *Sudlow*, 28 L. J. (Mat. Cas.) 4.
(*r*) Rule 15.
(*s*) Rule 14.

petitioner. After the entry of an absolute appearance to the citation, no objection can be taken to the jurisdiction (*t*).

There is an important difference between the course to be taken when no appearance has been entered to a suit in the Divorce Court, and the course to be taken in such event in an ordinary action.

In a suit in the Divorce Court the petitioner must prove his case to the satisfaction of the Court, in the same manner as if an appearance had been entered.

File affidavit of service.

His first step will be to file an affidavit in the registry that the parties have been duly cited and have not appeared (*u*), he may then at once apply to set the cause down for trial.

Interveners.

Applications for leave to intervene in any suit must be made to the judge by motion supported by affidavit, and the intervener joins in the proceedings at the stage in which he finds them, unless otherwise ordered (*x*).

By Queen's Proctor.

The Queen's Proctor shall within fourteen days after he has obtained leave to intervene in any cause enter an appearance and plead to the petition, and shall deliver a copy of the plea to the petitioner or his solicitor (*y*).

All subsequent pleadings and proceedings in respect to the Queen's Proctor's intervention in a cause shall be filed and carried on in the same manner as directed in

(*t*) Rules 19, 20, 22.

(*u*) Rule 17; *Wood* v. *Wood and Hutchinson*, 36 L. J. (Mat. Cas.) 48.

(*x*) Rules 23, 24.

(*y*) Rule 68.

respect of the pleadings and proceedings of the original parties to the cause (*z*).

The Queen's Proctor may move the Court by counsel without affidavit for leave to intervene (*a*).

After *decree nisi.*

When the Queen's Proctor desires to show cause against making absolute a decree *nisi* for dissolution or nullity of marriage, he shall enter an appearance in the cause in which such decree *nisi* has been pronounced, and shall within fourteen days file his plea in the registry, and on the same day deliver a copy thereof to the person in whose favour the decree has been pronounced, or his or her solicitor, and all subsequent pleadings and proceedings in respect to such plea shall be filed and carried on in the same manner as directed above in regard to the plea of the Queen's Proctor filed after obtaining leave to intervene in a cause (*b*).

Suits *in formâ pauperis.*

Any person desirous of prosecuting a suit *in formâ pauperis* must lay a case before counsel and obtain an opinion that there are reasonable grounds for proceeding. No such suit can be prosecuted without an order of one of the registrars, and to obtain such leave the case laid before counsel and his opinion thereon, with an affidavit stating that such case contains all material facts, and a further affidavit, made by the party applying, as to his or her income, and that he or she is not worth £25 after payment of debts (except his or her wearing apparel),

(*z*) Rule 69.
(*a*) *Anon.*, 2 S. & T. 249.
(*b*) Rule 202

shall be produced at the time such application is made (*c*).

Where a husband or wife has obtained leave to prosecute a suit against the other *in formâ pauperis* the wife or husband may obtain leave to defend *in formâ pauperis* on shewing poverty as required (*d*).

Each respondent who has entered an appearance, may within twenty-one days after service of citation on him, file in the registry an answer to the petition, and on the same day shall deliver a copy thereof to the petitioner or to his or her solicitor (*e*). **Answer.**

As we have seen, the ordinary time allowed for entering an appearance is eight days, but where further time is allowed by the Court (which further time is allowed when the party cited is abroad, or from other reasons cannot appear within such period), a respondent having appeared may within fourteen days from the expiration of the time limited for the entry of appearance file an answer to the petitioner (*f*).

Every answer which contains matter other than a simple denial of the facts stated in the petition, shall be accompanied by an affidavit, made by the respondent, verifying such other or additional matter, and such affidavit shall be filed with the answer. **Affidavit in support.**

In all suits other than a suit for restitution of conjugal

(*c*) Rules 25, 26.
(*d*) Rules 210, 211.
(*e*) Rules 28, 29.
(*f*) Rule 186.

rights, the respondent who is husband or wife of the petitioner shall in the affidavit filed with the answer further state that there is no collusion between the parties (*g*).

Form of.

In form an answer is a denial of the facts stated in the petition, and may in addition allege culpable acts or omissions on the part of the petitioner, or making recriminatory charges against him or her, and usually ends with a prayer for the rejection of the petition; but it is not necessary to ask for such rejection, for the respondent may in the answer claim relief; thus, in a suit for restitution of conjugal rights the respondent may plead cruelty or desertion, or adultery of the petitioner, and pray for a judicial separation.

And now in any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground in the case of a suit instituted by a husband of his adultery, cruelty, or desertion; or in the case of a suit instituted by a wife, on the ground of her adultery or cruelty, the Court may give to the respondent, on his or her application, the same relief as might have been obtained on an original petition (*h*).

Reply.

The petitioner shall file his reply to the answer within fourteen days from the filing and delivery thereof, and the same period is allowed for any rejoinder or subsequent pleading (*i*).

(*g*) Rules 28 to 31.
(*h*) 29 & 30 Vict. c. 32, s. 2.
(*i*) Rule 32.

Either party desiring to alter or amend any pleading, must apply to the Court for permission to do so, unless the alteration be merely a clerical error, when it may be made by order of a registrar (*k*). Amending.

If either party fail to file or deliver a copy of the answer, reply, or other pleading, or to alter or amend the same within the time allowed for the purpose, the party to whom the copy of such pleading should have been delivered shall not be bound to receive it, and such pleading shall not be filed, or be treated as filed, unless by order of a registrar, to be obtained on summons (*l*). Effect of failing to plead.

Formerly when the pleadings, on being concluded, had raised any question of fact, the petitioner, within fourteen days from the filing of the last pleading, or at the expiration of that time, on the next motion day, or in case the petitioner should fail to do so at such time, either of the respondents on whose behalf such questions had been raised might apply to the judge by motion to direct the truth of such question of fact to be tried by a special or common jury (*m*). Directions as to mode of trial.

But now it shall not be necessary so to do, but when the pleadings are concluded, the parties to a cause may proceed in all respects as though upon the day of filing the last pleading a special direction had been given by the Court as to the mode of hearing or trial to the effect following :—

(*k*) Rule 34.
(*l*) Rules 37, 181.
(*m*) Rule 40.

1. In cases in which damages are not claimed, that the cause be heard by oral evidence before the Court itself without a jury.

2. In cases in which damages are claimed, that the cause be tried before the Court with a common jury.

And any party may apply by summons for a direction that the cause may be tried or heard otherwise.

Before a cause is set down for hearing or trial, the pleadings and proceedings in the cause shall be referred to one of the registrars, who shall certify that the same are correct and in order; and the registrar to whom the same are referred shall cause any irregularity in such pleadings or proceedings to be corrected, or refer any question arising therefrom to the Court for its direction, and any party to the cause objecting to such direction of the registrar may apply to the Court on summons, to rescind or vary the same (*n*).

Before the trial, the citation must be returned into and filed in the registry, even where personal service has been dispensed with (*o*).

Pleadings must be complete.

And the pleadings must be complete; thus, in a suit for dissolution of marriage, the respondent and co-respondent traversed the adultery, and the respondent further countercharged adultery and cruelty. The petitioner having allowed the time for filing a replication to the respondent's answer to expire without replying or obtaining further time, the respondent moved the Court for

(*n*) Rules 205, 206.

(*o*) *Cooke* v. *Cooke and Quaile*, 28 L. J. (Mat. Cas.) 56.

an order for trial of the cause, but it was held that the Court had no power, the pleadings being incomplete (*p*).

Whenever the judge directs the issues of fact to be tried by a jury, the questions of fact raised by the pleadings are to be briefly stated in writing by the petitioner and settled by one of the registrars. Should the petitioner fail to prepare and deposit the questions for settlement in the registry within fourteen days after the judge has directed the mode of trial, either of the respondents on whose behalf such questions have been raised shall be at liberty to do so. Settling questions of fact for the jury.

After the questions have been settled by the registrar, a copy thereof must be delivered to each of the other parties to be heard at the trial, and either of such parties may apply to the judge by summons within eight days, or at the expiration of that time, on the next day appointed for hearing summonses in Court, to alter or amend the same, and his decision shall be final (*q*).

Only the issues stated in the questions will be gone into at the trial, and they will be held to bind the parties; a co-respondent who has not put in an answer to the petition cannot apply to amend (*r*).

In cases to be tried by a jury, the petitioner, after the expiration of eight days from the delivery of copies of the questions for the jury, to the opposite parties, or Setting down cause for trial.

(*p*) *Broadwood* v. *Broadwood and St. Albans*, 34 L. J. (Mat. Cas.) 10.

(*q*) Rules 41, 42, 43.

(*r*) *Tourle* v. *Tourle*, 1 S. & T. 176.

from alteration or amendment of the same, shall file such question in the registry, and at the same time set down the cause as ready for trial, and on the same day give notice thereof to the other parties who have appeared.

In cases to be tried without a jury, the petitioner shall, having obtained directions as to the mode of trial, set the cause down for hearing, and on the same day give notice thereof to the other parties who have appeared.

If the petitioner fail to file the questions for the jury, or to give due notice thereof for one month, after directions have been given as to the mode of trial, either of the respondents entitled to be heard at the trial or hearing, may file such questions, and set the cause down for hearing, and give notice thereof to the other parties (*s*).

When damages claimed, must be a jury.

When the petitioner claims damages against a co-respondent, they *must* be assessed by a jury (*t*).

No cause shall be called on for trial or hearing until after ten days from the same having been set down for trial or hearing. Either of the respondents, having appeared, may, without filing an answer to the petition in the principal cause, be heard on a question of costs; and a respondent who is husband or wife of the petitioner, may be heard in respect to any question as to custody of children (*u*).

Affidavits.

When facts have been directed to be proved by affidavits, such affidavits shall be filed within eight days

(*s*) Rules 44, 45, 46.
(*t*) 20 & 21 Vict. c. 85, s. 33.
(*u*) Rules 48, 50.

from such direction having been given, and in an undefended cause such affidavits may be filed at any time up to ten clear days before the cause is heard (*x*).

Counter-affidavits are to be filed within eight days from the filing of the affidavits which they are intended to answer; and copies of such affidavits and counter-affidavits shall on the day they are filed be served on the other parties (*y*).

Act on petition.

Any party to a cause, having appeared, may apply by summons to a registrar to be heard on his petition touching any collateral question in the suit, and having obtained such leave, he shall within eight days file his act on petition, and serve the other parties with a copy (*z*).

This is a speedy and convenient method of trying any incidental question arising in the suit, and is the means usually employed of determining a question of jurisdiction, when the respondent appears under protest.

New trial.

An application for a new trial or for re-hearing may be made to the judge by motion within fourteen days from the day of hearing, and if the judge be not then sitting to hear motions, on the next day appointed for hearing motions (*a*).

Showing cause against a decree.

Any person other than the Queen's Proctor, wishing to shew cause against making absolute a decree *nisi* for dissolution of marriage shall enter an appearance in the cause in

(*x*) Rules 51, 188.
(*y*) Rules 52, 53.
(*z*) Rules 56, 57, 181.
(*a*) Rule 62.

which such decree *nisi* has been pronounced; and shall within four days thereafter file affidavits in support of his application, and serve copies thereof on the party to the cause in whose favour the decree has been pronounced; and the party so served may within eight days file affidavits in answer, and serve the party shewing cause with copies thereof (*b*).

The questions raised on such affidavits shall be argued in such manner as the judge may on application by motion direct, and if he think fit, the same may be tried by jury, and in that case such questions are to be settled and tried in the same manner and subject to the same rules as any other issue (*c*).

Appeal.

"Formerly either party dissatisfied with any decision of the Court in any matter which, according to the provisions aforesaid, may be made to the judge ordinary alone, may, within three calendar months after the pronouncing thereof, appeal therefrom to the full Court, whose decision shall be final" (*d*).

But now, as we have before seen, all such appeals lie to the Court of Appeal, and from thence in certain cases to the House of Lords (*e*).

Either party dissatisfied with the final decision of the Court on any petition for dissolution or nullity of marriage may, within one calendar month after the pronouncing

(*b*) Rules 70 to 74.
(*c*) Rule 76.
(*d*) 20 & 21 Vict. c. 85, s. 55.
(*e*) 45 & 46 Vict. c. 68, s. 9.

thereof, appeal therefrom to the House of Lords, and on the hearing of any such appeal the House of Lords may either dismiss the appeal or reverse the decree, or remit the case to be dealt with in all respects as the House of Lords shall direct; provided always, that in suits for dissolution of marriage no respondent or co-respondent, not appearing and defending the suit on the occasion of the decree *nisi* being made, shall have any right of appeal to the House of Lords against the decree when made absolute, unless the Court upon application made at the time of the pronouncing of the decree absolute shall see fit to permit an appeal (*f*).

Party not appearing no right of appeal.

It will appear from the above that appeals in suits for nullity and dissolution of marriage lie to the House of Lords direct, but in all other cases to the Court of Appeal.

The judge ordinary is now empowered alone to hear and determine all matters arising in the Court, and to exercise all powers vested in the full Court or exercised by three or more judges thereof, provided that the said judge may, where he shall deem it expedient, direct that any such matter be heard and determined by the Court of Appeal, and either party dissatisfied with the decision of such judge sitting alone in granting or refusing any application for a new trial, may within *fourteen days* after the pronouncing thereof appeal to the full Court, whose decision shall be final (*g*).

(*f*) 31 & 32 Vict. c. 77, s. 3.
(*g*) 23 & 24 Vict. c. 144, ss. 1, 2.

An appeal to the Court of Appeal must be asserted in writing and the instrument of appeal filed within the allotted time, and notice thereof and a copy of the appeal must be delivered to the respondent.

The appellant must within ten days after filing his instrument of appeal file his case in support in triplicate, and deliver a copy thereof to the respondent or his or her solicitor, who shall be at liberty to file in like manner a case against the appeal (*h*).

Decree absolute.

Formerly all applications to make absolute a decree *nisi* for dissolution of marriage must have been made to the Court by motion. In support of such application it must have been shewn by affidavit filed with the case for motion, that search had been made in the proper books at the registry, up to within two days of the affidavit being filed, and that at such time no person had obtained leave to intervene in the cause, and that no appearance had been entered nor any affidavits filed on behalf of any person wishing to shew cause against the decree *nisi* being made absolute; and in case leave to intervene had been obtained, or appearance entered, or affidavits filed on behalf of any such person, it must have been shewn by affidavit what proceedings had been taken thereon (*i*).

But now, application to make absolute a decree *nisi* for dissolution or nullity of marriage need not be made by

(*h*) Rules 77, 78.
(*i*) Rule 80, and see rule 194.

motion, but it shall be sufficient to file in the registry, with the affidavit above mentioned, a notice in writing, setting forth that application is made for such decree absolute, which will thereupon be pronounced in open Court at a time appointed for that purpose (*k*).

(*k*) Rule 207.

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"Upon the general principles, according to which damages are to be assessed in actions of contract, *Hadley* v. *Baxendale* (9 Ex. 341) still remains the leading authority, and furnishes the text for the discussion contained in the second chapter of Mr. Mayne's book. Properly understood and limited, the rule proposed in that case, although in one respect not very happily worded, is a sound one, and has been repeatedly approved both in England and America. The subsequent decisions, which are concisely summarized by Mr. Mayne, have established that mere knowledge of special circumstances is not enough, unless it can be inferred from the whole transaction that the contractor consented to become liable to the extra damage. This limitation is obviously just, especially in the case of persons, such as common carriers, who have no option to refuse the contract. Mere knowledge on their part of special circumstances ought not, and, according to the *dicta* of the judges in the Exchequer Chamber in *Horne* v. *Midland Railway Company* (21 W. R. 481, L. R. 8 C. P. 131), would not involve the carrier in additional responsibility. Mr. Mayne's criticism of the numerous cases in which this matter has been considered leaves nothing to be desired, and the rules he deduces therefrom (pp. 32, 33) appear to us to exhaust the subject.

"Mr. Mayne's remarks on damages in actions of tort are brief. We agree with him that in such actions the courts are governed by far looser principles than in contracts; indeed, sometimes it is impossible to say they are governed by any principles at all. In actions for injuries to the person or reputation, for example, a judge cannot do more than give a general direction to the jury to give what the facts proved in their judgment required. And, according to the better opinion they may give damages 'for example's sake,' and mulct a rich man more heavily than a poor one. In actions for injuries to property, however, 'vindictive' or 'exemplary' damages cannot, except in very rare cases, be awarded, but must be limited, as in contract, to the actual harm sustained.

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